Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

No. 78-1287

AMERICAN MARITIME ASSOCIATION,
*Petitioner,*

v.

W. MICHAEL BLUMENTHAL AND
AMERADA HESS CORPORATION.

## PETITION OF AMERICAN MARITIME ASSOCIATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION OF AMERICAN MARITIME ASSOCIATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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American Maritime Association respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-33a) is not yet reported. The opinion of the district court (App. C, *infra*, pp. 36a-62a) is reported at 458 F. Supp. 849 (D.D.C. 1977).

### JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 34a-35a) was entered November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Section 27, Merchant Marine Act, 1920, as amended, 41 Stat. 999, 46 U.S.C. 883, the Jones Act, forbids foreign-flag vessels to transport "merchandise * * * between points in the United States * * * embraced within the coastwise laws either directly or via a foreign port, or for any part of the transportation * * *."

The question is whether the transport in foreign-flag tankers of petroleum from Valdez, Alaska, to the Virgin Islands (which are outside the coastwise laws) for processing and of the petroleum products to points on the East Coast of the United States violates the statute.

## STATUTES INVOLVED

The relevant statutes, Sections 27 and 21 of the Merchant Marine Act, 1920, 46 U.S.C. 883, 877, are set forth in App. D, *infra*, pp. 63a-64a.

## STATEMENT

Section 27, Merchant Marine Act, 1920, 41 Stat. 999, 46 U.S.C. 883, forbids on penalty of forfeiture the transportation of merchandise by water (or for any part of the transportation) between points in the United States embraced within the coastwise laws, except on vessels having the privilege of engaging in the coastwise trade. Section 21 of the Act, 41 Stat. 997, 46 U.S.C. 877, extended the coastwise laws to the island territories and possessions of the United States, but excepted the Virgin Islands until (by a 1936 amendment, 49 Stat. 1207) the President should otherwise proclaim.

In September, 1977, the Amerada Hess Corporation commenced a course of shipments by foreign-flag vessel of crude oil from Valdez, Alaska, which it carries to its refinery in St. Croix, Virgin Islands, and thence, after



refining (a process occupying 30 to 60 days), to points on the East Coast of the United States in the form of various refined products, principally residual heating oil and gasoline. The ports of origin and ultimate mainland delivery are points in the United States embraced within the coastwise laws. At the time suit was brought against the Secretary of the Treasury to restrain clearance and for declaratory judgment, Hess was employing one very large crude carrier (VLCC); since then it has expanded operations to five VLCCs averaging more than 250,000 deadweight tons (dwt), which are now carrying cargoes approximately equivalent to 100,000 barrels a day (b/d). As the total movement of Alaskan crude oil to the Gulf and East Coast on American vessels has been the equivalent of 325,000 b/d during the most recent two months reported, the foreign-flag movement has now reached over 30% of the American-flag total; that is, nearly 25% of the total Alaska lift to the East Coast has already been diverted to foreign flag.

This trend will undoubtedly continue, as the lower courts said, both because the oil in question is surplus to the West Coast market and must move east, and because the cost of shipment to St. Croix by foreign ship is estimated to be about one-quarter of that by American ship, and about two-thirds for the leg from St. Croix to the East Coast (App. A, *infra*, p. 6a, note 12). Since Alaska crude must compete on the mainland with foreign crude imported in foreign bottoms, the producer, Standard Oil of Ohio, has naturally preferred to sell to Hess, provided foreign ships may lawfully be employed: for in that case it nets a price less foreign shipping cost rather than American. As for Hess, it will prefer Alaskan oil if it is to any extent cheaper than foreign crude. The difference in shipping cost enables Sohio to meet that condition. The Alaska-Virgin Islands movement by foreign ship has therefore quintupled in a year's time, and already represents 20% of Hess's refinery production.

Petitioner contended that the short pause for refining in the Virgin Islands does not invoke the exception clause of § 877 because it does not interrupt the economic continuity of the movement essentially between Alaska and East Coast United States, both origin and destination being points plainly embraced by the coastwise laws within the meaning of § 883. It pointed to this Court's long line of decisions in many different areas of commerce holding that intermediate processing, refining or manufacturing does not break the continuity of commerce subject to federal regulation, and sought to show that they govern federal regulation of coastwise trade or commerce under § 883.

The Secretary, however, has taken the position that the refining process at St. Croix created "new and different products", and therefore made two separate voyages, one of crude oil to, and the other of products from, the excepted Virgin Islands. This conception he draws from the tariff laws and regulations, where its operation enhances the revenue by narrowing the class of goods entitled to non-dutiable reentry after export.

The district court sustained the Secretary (App. C, *infra*) and on appeal was affirmed by the court of appeals (App. A, *infra*). The latter approached the statute as subject to strict construction because of its forfeiture provision, and gave special prominence to the Virgin Islands exemption clause. While acknowledging that a voyage from Alaska to the East Coast, even with transshipment at an exempted port such as St. Croix, would fall within the Act, it considered inapplicable the precedents of this Court governing manufacture in the course of commerce, understanding them to deal only with constitutional power to regulate. Looking to § 883, the court held that Congress has not here exercised this power, because the word "merchandise" should be read as meaning the "same" merchandise; on the findings below that refined products are not the "same" as the crude oil from which they are



distilled, it concluded that the voyage broke at the Virgin Islands. The court buttressed its holding by the speculative effects of a contrary holding on foreign commerce, a significant part of which it thought might be deemed absorbed into coastwise trade.

## REASONS FOR GRANTING THE WRIT

The Court below has interpreted Section 27, Merchant Marine Act, 1920, in a way that threatens the viability of the U.S.-flag fleet which it is the Act's primary purpose "to develop and encourage." Section 1, Merchant Marine Act, 1920, 46 U.S.C. 861. In holding the Jones Act inapplicable to the transport of oil between coastwise ports by reason of its processing *en route* at an exempted port, the court has decided an important federal question not previously addressed by this Court in a way inconsistent with this Court's construction of other statutes regulating interstate commerce.

The court of appeals acknowledged that Hess "intended that most of the crude oil shipped from Valdez return in some form to the mainland United States—in fact it was bound by law not to sell it abroad." App. A, *infra*, p. 18a. It recognized that this "flow of crude oil from Prudhoe Bay [to the Virgin Islands] and then in the form of gasoline to the gas tank of the ultimate consumer anywhere in the continental United States is * * * domestic, interstate U.S. commerce." Id. at p. 23a.

Finally, the court conceded that manufacture in the course of interstate movement "does not oust federal regulatory power". Id. at p. 22a, note 54, citing *Stafford* v. *Wallace*, 258 U.S. 495 (1922); *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923), in which this Court held processing and manufacture to be mere incidents of the flow of commerce, not to be treated as interrupting it.[1]

[1] The court also cited Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911), and Swift & Co. v.

However, the court of appeals distinguished the constitutional power of Congress to regulate from the question "whether it has *exercised that power* in a particular case" (ibid., original emphasis).

The court ruled that Congress has not "exercised that power" in § 833 with respect to merchandise transported through a processing point to another coastwise point. The crux of that holding is the following corrected language (App. A, *infra*, p. 22a, note 54).

> Though manufacture or processing of a product may be too "incidental" to interrupt the flow of commerce generally, such alteration in the nature of the goods may yet be substantial enough to exempt those goods from the intended reach of a particular statute.[2]

Because the Act lacks a specific reference incorporating intermediate processing in the regulated sphere, the court considered its reach limited to the "same" merchandise (App. A, *infra*, p. 13a), a reading deemed reinforced by the forfeiture clause. Hence the scope of regulation depends on "the degree to which the goods are altered *in fact* in the course of commercial dealings." App. A, *infra*, p. 17a (original emphasis). A finding that "crude oil is simply quite different from the products which come out of a refinery" (App. A, *infra*, p. 13a) was consequently decisive.

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United States, 196 U.S. 375 (1905), as cases testing constitutional power to reach intermediate processing. On the contrary, they *construe* the Interstate Commerce Act and the Sherman Act as reaching such processing although neither mentions it, but speaks only of commerce.

[2] The court had originally said (slip op., 22, note 54);

> Though manufacture or processing of a product may be too "incidental" to interrupt the flow of commerce generally, it may not be so incidental as to delimit the boundary to a particular statute's intended reach.

The court modified its opinion to the language of the text by order entered January 24, 1979.



But this reasoning contradicts the decisions of this Court. In enactments that constitute major structural members in the national economy there is no verbal reference at all to processing or manufacturing, and the term "interstate trade or commerce" standing alone (like coastwise trade in § 883) has been sufficient to show congressional intention to reach the whole flow before, during and following a pause for such processing. The Interstate Commerce Act speaks only of transportation from state to state, 49 U.S.C. 1; the Natural Gas Act, of "transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale", 15 U.S.C. 717(b); and the Sherman Act, of acts "in restraint of trade or commerce among the several states or with foreign nations", 15 U.S.C. 1. Under each of these Acts, absence of special reference to manufacturing or processing interposed in a locus physically outside of interstate commerce (characteristically at an intrastate point before or in the course of the physical movement) has not been held to manifest an intention of Congress to exclude it from regulation as part of the given area of commerce. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 526 (1911);[3] *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 247 F.2d 882, 888 (C.A. 5, 1957),[4] *cert. denied*, 355 U.S.

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[3] "* * * the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the trans-shipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy." See Texas & New Orleans R.R. Co. v. Sabine Tram Co., 227 U.S. 111, 125-126 (1913); Carson Petroleum Co. v. Vial, 279 U.S. 95, 106 (1929) (quoting this language with approval).

[4] "* * * the processing does not interrupt the continuous movement of the gas from the wellhead to the consumer burner tips and is merely a part of the business of transporting and marketing gas in interstate commerce."

930 (1958); *Swift & Co.* v. *United States*, 196 U.S. 375 (1905);[5] *Mandeville Island Farms, Inc.* v. *American Sugar Co.*, 334 U.S. 219 (1948).

Two strands of reasoning have underlain the doctrine, both originally propounded by Mr. Justice Holmes. One line rested on this Court's perception of commerce as a continuous stream or current, *Swift*, *supra*, at 399; *Stafford*, *supra*, at 518-519, which was not to be deemed interrupted because "an essential but subordinate part" took place in an area nominally outside federal commerce jurisdiction. *Stafford*, id. The movement was "in" commerce in the true economic sense, and intermediate processing, no matter how transforming, was only a contemplated phase of the movement in commerce. This was all the more striking because as *Mandeville*, *supra*, 334 U.S. at 229 ff., pointed out, the Court's first approach to the problem had very nearly read the Sherman Act out of existence, *United States* v. *E. C. Knight Co.*, 156 U.S. 1 (1895).[6] The change initiated by *Swift*[7] was so complete that a decade later the Court considered its repudiation of the "manufacture" argument too well settled to merit discussion. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 68 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 183-184 (1911).

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[5] See note 7, *infra*.

[6] "Commerce succeeds to manufacture, and is not a part of it. * * * Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce * * *." 156 U.S. at 12, 14.

[7] "When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States." 196 U.S. at 398-399.



As the law has developed, the Court has taken an even broader view than encompassed in that of the flow of commerce. The question came to be whether the challenged course of action collides with the particular concern in commerce that Congress has defined in the statute.[8] And even where that concern is expressed only in the general term "trade or commerce", it takes precedence over actions affecting it that happen to include incidents themselves otherwise static or exempt.

As the Court said in *Mandeville*, this "affectation doctrine", whose full expression it traced to Mr. Justice Hughes in the *Shreveport Rate Cases*, 234 U.S. 342 (1914), was not confined to transportation, but "was rather an integer in the sum of power over commerce, of which authority over transportation was but a part * * *. Once applied to transportation and the Interstate Commerce Acts, it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act." 334 U.S. at 232, note 11. Thus the same principle governs all. "The *Shreveport* doctrine cut Congress loose from the haltering labels of 'production' and 'manufacturing' and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action." 334 U.S. at 232-233.

To the specific argument in *Mandeville* "that the change undergone in the manufacturing stage when the beets

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[8] As said, Swift itself foreshadowed this development. In distinguishing the state tax cases, Mr. Justice Holmes said: "But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it." 196 U.S. at 399.

are converted into sugar makes the case different" (an argument which the Court said "very nearly denies that sugar beets contain sugar," 334 U.S. at 228), the Court replied. 334 U.S. at 238:

> For mere change in the form of the commodity or even complete change in essential quality by intermediate refining, processing, or manufacturing does not defeat application of the statute to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act [footnote omitted]. Again, as we have said, the vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect in a scheme as closely knit as this in all phases of the industry. Hence in this case the mere fact that the price fixing related directly to the beets did not sever or render insubstantial its effect subsequently in the sale of sugar.

This shows the regressive nature of the position taken here by the court of appeals that "crude oil is simply quite different from the products which come out of a refinery." App. A, *infra*, p. 13a.[9] A statute on its face governing trade or commerce, whether or not containing

[9] The requirement of "sameness" does not appear in § 883, although presented as reached from the statutory words. It is derived by the court of appeals from the Secretary's ruling that processed merchandise constitutes a "new and different product", and that therefore the voyage which brings crude oil from Alaska to St. Croix is not the same voyage which carries residual oil away to the mainland, although the intention of through shipment is unbroken from beginning to end. This ruling in turn derives from the Secretary's practice in administering the tariff laws, under which the Customs Service has a natural impulsion to find that any processing in a foreign port renders the product foreign and thus dutiable if reentered. Its rulings under the Jones Act are in the language of Tariff Schedule Items 800.00 and 807.00 and the regulations interpreting them, 19 C.F.R. §§ 10.1(b) and (f), 10.8a, 10.13, 10.14(a) and (b), which in substance say that "substantial transformation occurs when, as a result of manufacturing processes, a new and different article emerges." Loss of physical identity, an advance in value or improvement in condition are the tests of this metamorphosis. As we note hereinafter in the text, the policies that impel the Jones Act are wholly different from those underlying the tariff laws.

That the same processing might be deemed to interrupt continuity of voyage for revenue purposes but not to interrupt it for Jones Act purposes is quite consistent with the views of this Court. Historically, the same processing that has been held not to interrupt continuity for commerce clause purposes has also been held to interrupt it sufficiently to allow state taxation. Compare Board of Trade v. Olsen, 262 U.S. 1, 33 (1923), with Bacon v. Illinois, 227 U.S. 504, 508 (1913), both dealing with inspecting, weighing, cleaning, clipping, drying, sacking, grading and mixing grain.



immediate verbal reference to intermediate manufacturing,[10] reaches the exact kind of physical change to which the lower court attached negative significance. The present case falls naturally within the Court's "flow of commerce" formulation. The whole movement from Alaska through the Virgin Islands to the East Coast is concededly *in* commerce and thus controlled by the cases holding that manufacture does not break the flow. It is also true that the diversion to the Virgin Islands affects the precise interest of Congress in reserving to American ships the entire movement of "merchandise" in coastwise trade.

The legislative concern is demonstrably with the coastwise sector of commerce as a key factor in national security.[11] The overriding purpose was to preserve coast-

[10] It is clear that cases like Stafford and Olsen, which settle the question of power over commerce, do not turn on specific inclusory language. The current-of-commerce and affecting-commerce approaches alike negate any requirement of talismanic formulae. Compare National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682 (1947); California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965).

[11] "* * * [T]he coasting privilege should be absolutely confined to vessels built in the United States * * * Except for the American-built tonnage developed under that policy, we would have been in sorry plight at the time of our entrance into the World War * * * Unless our coasting fleet be wholly and unequivocally owned by loyal American citizens, it cannot be rated a dependable unit in time of national emergency." S. Rep. 573, 66th Cong., 2d Sess. 7 (1920).

The coastwise fleet was equally important in the second World War. H. Rep. 96-589, 95th Cong., 1st Sess. 22 (1977). At present,

wise trade to American shipping, a policy acknowledged by the court of appeals, App. A, *infra*, p. 6a, note 12, and in a subsequent decision handed down on February 6, 1979, *Alaska Bulk Carriers* v. *Kreps*, No. 77-2080 (slip op. pp. 52-53).[12]

On the present findings, refining is a crucial stage in the marketing of the original crude oil. Far from being a discrete episode or an interruption of the economic movement coastwise between Alaska and the East Coast, the halt in St. Croix is actually essential to the flow, for the refining defines ultimate utilization. Such an integrated economic process cannot be deemed extruded from regulated coastwise trade because "an essential but subordinate part" takes place in a locus deliberately chosen on the chance of evading the regulation.

To exempt the interstate movement on account of the local refining creates the very danger that the statute proposed to obviate. It introduces foreign shipping, on a scale already massive, rapidly growing and imminently

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unsubsidized coastwise tonnage constitutes about 75% of the American tanker fleet of nearly 12 million dwt.

[12] "The policy of the Act is to create a protected area of purely American shipbuilding and ship operation in the domestic coastwise trade. This is accomplished by excluding all foreign-built or foreign-operated vessels from this trade. The American shipowner and shipbuilder then knows that he must compete only with like-situated American shipowners and shipbuilders, and he can adjust his sights accordingly."

The significance of this factor lies in the policy of the Act to look to the commercial market and private capital to accomplish the defense object of the statute. "This policy is justified by the marginal commercial utility of such a fleet in peace, and results in very large savings to the Treasury in respect of what remains essentially a military procurement." H. Rep. 95-589, 95th Cong., 1st Sess. 21 (1977). Without the commercial opportunity reserved for them by this Act, American shipowners cannot carry the unique burden of defense laid upon them, and the nation loses the advantage of having always ready at private expense an important arm of defense. See note 11, *supra*.



mortal to domestic shipping, into a trade that in all practical economic respects flows between points in the United States legally coastwise. It creates a gap so wide as to vitiate the regulatory system Congress erected in the highest interests of state.

As set forth in the Statement, Hess is now moving nearly 100,000 b/d from Alaska in foreign ships, which already represents 30% of the 325,000 b/d carried via the Panama Canal in American ships during, respectively, December 1978 and January 1979. Of the Panama Canal movement in such American ships Hess is still receiving an estimated 40,000 b/d, which of course can be shifted at will to foreign shipping; its total purchases moving or capable of moving in foreign ships (100,000 + 40,000 = 140,000 b/d) have already reached one third of the total lift in each of these months (325,000 + 100,000 = 425,000 b/d) from Alaska to the East Coast and Gulf—in total (in foreign and American ships) already filling about 28% of its reported production (not 5%, as the court below said, App. A, *infra*, p. 25a).

The consequences for American shipping will be catastrophic. Fully half the domestic tanker fleet is under charter for Alaska service, of which about 2.5 million dwt have been engaged in service to or through the Panama Canal. Displacement of this fleet on such a scale will reverberate throughout the limited remaining domestic markets by massive over-tonnaging.

The interpretation below turns on a distinction as overtechnical and mistaken as that which this Court rejected on the last occasion on which it considered § 833. *Central Vermont Transportation Co.* v. *Durning*, 294 U.S. 33 (1935). There it was contended that a sea movement over the American part of a through rail-water route via Canada qualified a foreign-owned ship for the through-route exemption of § 883. The Court said, 294 U.S. at 38, 39:

> The construction for which petitioner contends does violence to the words of the statute and would thwart its purpose. The policy declared by the enacting clause, and restated in the first section, of the Merchant Marine Act is "to provide for the promotion and maintenance of an American merchant marine." The policy has found expression in the enactment of a series of statutes, beginning with first year of the government, which have imposed restrictions of steadily increasing rigor on the transportation of freight in coastwise traffic by vessels not owned by citizens of the United States [footnote omitted] * * *.
>
> An interpretation of the proviso which would enable foreign-owned vessels to carry merchandise in coastwise traffic, over routes wholly within the United States, by the expedient of filing tariffs showing participation in through routes extending over Canadian railways, would go beyond its purpose and in large measure defeat the prohibition of § 27. Both the words of the statute and the unmistakable policy of Congress compel the conclusion that the merchandise respondent has seized and threatens to seize is not within the immunity of the proviso.

The Court thus relied upon the fundamental purpose of Congress to favor American shipping and pointed to § 1 of the Act, 46 U.S.C. 861, which declares the policy of the United States "to do whatever may be necessary to develop and encourage the maintenance" of a citizen-owned merchant marine in the interest of national defense and commerce, and which commands that the agencies of government shall, "in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained."

The court below justified its narrow reading on three grounds: (1) The Virgin Islands exemption, § 877 (App. A, *infra*, pp. 23-26a). (2) The presence of a forfeiture feature assertedly implying strict construction (App. A, *infra*, pp. 20-22a). (3) The possibility that a contrary ruling might extend the coastwise preference for American ships to foreign trade (App. A, *infra*, pp. 27-28).



(1) *The Virgin Islands Exemption.* Section 21 of the 1920 Act, 46 U.S.C. 887, extended the coastwise laws to the island territories and possessions of the United States, but by a proviso amended in 1936, 49 Stat 1207, excepted the Virgin Islands until the President should proclaim their inclusion. This exception by itself does not authorize the use of foreign ships in the transportation here in issue. The district court pointed out that it clearly covers voyages that begin or terminate in the Virgin Islands, and that it does not apply to shipments between points in the United States by way of the Islands. App. C, *infra*, pp. 41a-42a. It is only by treating such shipments as two voyages, one terminating and one beginning, that the proviso can be made to cover the case.

On established principles, it is the exception to the primary objects of a statute that is to be strictly construed, and certainly never in such a way as to nullify them. *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 683, 691 (1947); *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 247 F.2d 882, 888-889 (C.A.5, 1957). Here the legislative history of the exception is decisive that it was intended to have narrow effect, and that the continuing amendment in 1936 was actually framed to afford the President flexibility in "restoring the coastwise laws". H. Rep. 2281, 74 Cong. 2nd Sess. 2 (1936). The object of the continuation was not to protect the economy of St. Croix, which required no protection,[13] but to protect the bunkering trade in coal

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[13] See testimony of Governor Cramer, Hearings on S. 754 before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2nd Sess. 21 (1936).

on St. Thomas, which consisted in shipping coal from Hampton Roads for resale to foreign ships—a business long extinct.[14] In recommending it, the House Committee said: "Your Committee, however, has no intention of weakening in any way the coastwise laws of the United States and only because of the exceptional conditions referred to, recommends the present suspension of those laws until the President shall declare that such coastwise laws shall extend to the islands". H. Rep. 2281, 74th Cong., 2nd Sess. 2 (1936).

The consequence of the decision below is to distort the exemption from its statutory objects and to cause it to be used not intrinsically to advance the economy of the Virgin Islands, but to give adventitious benefits primarily to non-Virgin Islands interests, specifically, a major oil producer in Alaska whose real market is on the mainland, and which finds a windfall transportation profit in using foreign-flag ships to the St. Croix refinery rather than American ships to mainland refineries. As interpreted below, the exception swallows up the coastwise laws.

(2) *The Forfeiture Feature.* The holding that the civil forfeiture feature requires the statute to be construed strictly (App. A, *infra*, pp. 20a-22a) is obsolete in principle, and inapplicable to § 883 or to this proceeding.

(a) The present case is not for forfeiture, but an application for declaratory judgment filed before forfeiture was incurred. The judgment would, therefore, give ample notice of the statutory meaning. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, 235-237 (1966).

(b) In an actual forfeiture under § 883, this Court based its analysis entirely on a fair construction of the statute

[14] See statement of Ernest Gruening for the sponsoring Department of the Interior, Hearings, *supra*, at 8.



in light of its policy and intention, with no reference to strict construction. *Central Vermont Transportation Co.* v. *Durning*, *supra*, 294 U.S. 33 (1935).

(c) Congress has expressly decreed in § 1 of the 1920 Act, 46 U.S. 861, that in carrying out the declared "policy of the United States to do whatever may be necessary to develop and encourage" the American merchant marine, the responsible government agencies "shall, * * * in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained." This requires the broadest reading of § 883 to effectuate its purposes. *Central Vermont*, *supra*, 294 U.S. at 38-39.

(d) In any case, remedial and regulatory statutes, though criminal, are to be read with broad respect for their intended purposes, as the court of appeals itself has held. *Jordan* v. *Acacia Mutual Life Ins. Co.*, 409 F.2d 1141, 1144-1145 (C.A. D.C.), *cert. denied*, 395 U.S. 959 (1969). This Court has said that even in a criminal context the canon of construction "does not demand that a statute be given the 'narrowest meaning.'" *United States* v. *Brown*, 333 U.S. 18, 26 (1948). "It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States* v. *Cook*, 384 U.S. 257, 262-263 (1966).

(3) *Foreign Commerce.* The court below also urged a strict construction on the ground that a holding favorable to the U.S.-flag fleet "would jeopardize innumerable foreign industries, in lands other than the Virgin Islands, that rely both on American sources of supply for raw material and on the vast American market for re-export" (App. A, *infra*, p. 27a). The implication of vast and unmeasurable impact is itself negated by the court's acceptance of Hess' assertion that this "jeopardize[d]" trade was only $6 billion annually. Correcting this figure

for purely overland movements to Mexico and Canada, which the court overlooked, it amounted to about 1.5% of U.S. merchandize foreign trade in the referenced year, $239 billion.

Moreover, the court failed to note the statistical analysis of Hess' claims made in reply by AMA, which showed that there was no continuity of movement in these articles. Under established doctrine the continuity of commerce is not broken if at the place of interruption there exists little or no local market for the merchandise, a condition that plainly evidences an original intention to resume the transportation.[15] In other words in such a case the current of commerce flows beyond the local market.

The exports selected by Hess, and adopted by the court, fail uniformly to meet this standard; in every instance the overwhelming proportion is consumed by the importing country, and a negligible part finds its way back to this country in the finished goods.[16]

Continuity of voyage cannot be asserted when the local market where the interruption takes place absorbs from 94% to more than 99% of the merchandise. *Supra.*

[15] Carson Petroleum Co. v. Vial, 279 U.S. 95, 99 (1929); Louisiana R.R. Comm. v. Texas & Pacific Ry., 229 U.S. 336, 339 (1913); Texas & New Orleans R.R. Co. v. Sabine Tram Co., 227 U.S. 111, 120 (1913); Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 526 (1911).

[16] The data (more fully set forth in the Statistical Appendix to the Reply Brief in the court of appeals and reproduced here as App. E) are in brief:

| EXPORT | PERCENTAGE RE-IMPORTED AS FINISHED GOODS |
|---|---|
| Raw cotton "to the Far East" | 3.7 |
| Electronic components shipped "abroad" | 6.1 |
| Iron ore "to Japan" (none) | 0.0 |
| Iron and steel scrap "to Japan" | 5.4 |
| Raw hides "exported abroad" | 0.1 |



There is then no flow of commerce between coastwise points embraced within § 883 and therefore no risk of extending the statute into foreign commerce.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# Appendices



APPENDIX A

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 77-1934

AMERICAN MARITIME ASSOCIATION, APPELLANT

SHIPBUILDERS COUNCIL OF AMERICA,
SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
AFL-CIO

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY,
ET AL.

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No. 77-1962

AMERICAN MARITIME ASSOCIATION,
SHIPBUILDERS COUNCIL OF AMERICA
SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
AFL-CIO, APPELLANTS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY,
ET AL.

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**Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.**

No. 77-1970

AMERICAN MARITIME ASSOCIATION,
SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
AFL-CIO
SHIPBUILDERS COUNCIL OF AMERICA, APPELLANTS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY,
ET AL.

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Appeals from the United States District Court
for the District of Columbia

(D.C. Civil 77-1508)

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Argued 16 October 1978

Decided 20 November 1978

*Joseph A. Klausner* with whom *Thomas H. Boggs*, *Allan Abbot Tuttle*, and *John L. Oberdorfer* were on the brief, for appellant in No. 77-1934.

*J. Stephen Street* with whom *William W. Scott* and *Richard E. Schwartz* were on the brief, for appellant in No. 77-1970.

*Howard Schulman* with whom *David Jaffe* was on the brief, for appellant in No. 77-1962.

*William J. Cassidy, Jr.*, Assistant United States Attorney with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, *Dennis A. Dutterer*, and *Regina A. McGranery*, Assistant United States Attorneys were on the brief, for appellee, W. Michael Blumenthal in Nos. 77-1934, 77-1962 and 77-1970.



*Mark P. Schlefer* with whom *Michael Joseph* and *Thomas L. Mills* were on the brief, for appellee, Amerada Hess Corporation in Nos. 77-1934, 77-1962 and 77-1970.

Before: BAZELON, MCGOWAN and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: This case involves the applicability of a section of the Merchant Marine Act of 1920 [1] known as the "Jones Act" [2] to the transportation of crude oil by foreign-flag tanker from Valdez, Alaska, to the U.S. Virgin Islands, and the subsequent transport of products refined from that oil from the Virgin Islands to the continental United States. In the District Court plaintiffs American Maritime Association (U.S. steamship companies), Shipbuilders Council of America (domestic shipbuilders), and Seafarers International Union (maritime labor union) sought a declaratory judgment against the defendant Secretary of the Treasury and intervening defendant Amerada Hess Corporation (owner of the crude oil cargo) providing that the transport of the oil violated the Jones Act and an injunction to compel the U.S. Customs Service (Treasury Department) not to issue permits and clearances needed for its transport.[3]

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[1] Pub. L. No. 66-261, 41 Stat. 988, ch. 250 (5 June 1920), as amended, 46 U.S.C. §§ 861-889 (1970 & Supp. V 1975).

[2] Merchant Marine Act of 1920, § 27, 41 Stat. 999, as amended, 46 U.S.C. § 883 (Supp. V 1975). The term "Jones Act" is perhaps most commonly used to refer to section 33 of the Merchant Marine Act of 1920. *See* 41 Stat. 1007, 46 U.S.C. § 688 (1970). This section provides for recovery for injury to, or death of a seaman. *See id.* In this opinion, however, we will use the term "Jones Act" to refer only to section 27 of the Merchant Marine Act of 1920.

[3] The initial complaint was filed by Appellant American Maritime Association on 2 September 1977. *See* Jt. App. at 35-48.

District Judge Oliver Gasch ruled against the plaintiffs and dismissed the action.[4] Finding the action of the trial court and the Customs Service preceding it to be based on sound statutory interpretation, judicial and administrative precedent, we affirm.

## I. Background

Among the many diversified petroleum interests of Hess is the ownership and operation of an oil refinery in St. Croix, Virgin Islands. Constructed in 1966, this refinery is the principal manufacturing facility of Hess and, apart from port and other facilities at St. Croix owned by Hess, represents an investment of some $650 million.[5] In a representative period, 83% of the products produced at the Virgin Islands refinery are shipped by Hess to the continental United States, and the remainder marketed for use in the Virgin Islands or sold to the United States Government.[6] In 1969 Hess acquired an interest in Alaska's North Slope oil, which, from the southern terminus of the Alaska pipeline at Valdez, must be transported by tanker to a refinery for processing.

Planners of the Alaska pipeline system initially contemplated that the sea leg from Valdez would be relatively short, as the crude oil would be transported only to the U.S. West Coast.[7] The current glut of oil in the Western United States, however, has made it necessary to transport and refine Alaskan crude oil elsewhere. In 1969 Hess announced its plans to transport its share of

[4] *American Maritime Association, et al.* v. *Blumenthal, et al.*, No. 77-1508 (14 Oct. 1977) (Gasch, J.).

[5] *See* Brief for Appellee Hess Corp. at 4-5.

[6] *Id.* at 9.

[7] *See* note 72 *infra* (review of legislative history indicating assumption of Congressmen that all Alaska oil would be shipped to U.S. West Coast).



the Prudhoe Bay crude from Valdez around Cape Horn to its St. Croix refinery in foreign-flag tankers.[8] At St. Croix the crude would be refined into some eleven separate products which, with the exception of a small portion consumed in the Virgin Islands, would be exported to the United States.[9] In furtherance of Hess' petroleum enterprise, the *Hercules*, a foreign-flag tanker, began its voyage from Valdez to St. Croix on 3 September 1977.[10]

We now turn to the maritime laws of the United States and the Government enforcement agency involved here. From our First Congress in 1789, American shipping in the United States coastwise maritime trade has been protected from foreign competition.[11] Traditionally, in order to encourage the development of an American merchant marine, for both national defense and commercial pur-

[8] *See* Brief of Appellee Hess Corp. at 6.

[9] Under present law Alaskan crude oil and its by-products cannot be sold abroad, although the oil may be exchanged for oil procured elsewhere in equivalent amounts. *See* Export Administration Amendments of 1977, Pub. L. No. 95-52, § 110, 91 Stat. 235 (22 June 1977) (prohibiting export of Alaskan crude oil unless the President makes certain determinations).

[10] The *Hercules* was a Liberian-flag crude oil tanker with a cargo capacity of 216,641 tons deadweight. The ship was chartered by Amerada Hess Corporation, and set sail from Valdez for St. Croix with a cargo of 1,466,000 barrels of crude oil worth approximately $20 million. *See* Brief for Appellee Blumenthal at 10-11. All of the crude oil carried by the *Hercules* was destined for manufacture into petroleum products at the St. Croix refinery. *See* Jt. App. at 609.

[11] *See* Act of 4 July 1789, ch. 2 § 5, 1 Stat. 24, 27 (discount on duties for goods imported in vessels owned by U.S. citizens); Act of 20 July 1789, ch. III, 1 Stat. 27 (tax on foreign vessels transporting U.S. products "coastwise" within the United States); Act of 1 March 1817, ch. 31, 3 Stat. 351 (direct prohibition of use of foreign vessels in domestic trade). These statutes are codified in their present form at 46 U.S.C. § 883 (Supp. V 1975).

poses, all vessels engaged in the coastwise or other domestic trade have been required to be American-built and American-owned.[12]

The foreign maritime trade of the United States has always—and necessarily—been different. As a practical commercial matter it would be impossible to prohibit foreign-flag vessels from carrying goods to and from the United States and another country. The purchaser or supplier of goods to or from the United States would have equal right, and the commercial and political leverage to enforce such right, to have the goods transported in vessels of its choice. Hence, the United States effort to maintain an adequate merchant marine in foreign commerce has, at least in the twentieth century, gone

[12] For example, the Jones Act, which is the statutory centerpiece of the protective framework, was enacted "to protect the American shipping industry already engaged in the coastwise trade, to provide work for American shipyards, and to improve and enhance the American Merchant Marine." *Marine Carriers Corp.* v. *Fowler*, 429 F.2d 702, 708 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). *See also Central Vermont Transportation Co.* v. *Durning*, 294 U.S. 33, 38-39 (1935); *Pennsylvania Ry. Co.* v. *Dillon*, 118 U.S.App.D.C. 257, 260 n.5, 335 F.2d 292, 295 n.5 (1964), *cert. denied*, 379 U.S. 945 (1964). *Cf.* Merchant Marine Act of 1920, § 1, 46 U.S.C. § 861 (preamble) (purpose and policy of the United States to "have a merchant marine of . . . vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary . . ."). Protection from foreign shipping competition has been deemed necessary to achieve these goals because of the vastly higher construction and operating costs involved in use of American-flag compared with foreign-flag vessels. A typical charter rate, for example, for an American-flag vessel capable of carrying 35,000 to 45,000 tons of cargo between St. Croix and New York would be $6.16 per long ton, compared with $3.69 per long ton for a foreign-flag vessel. Charter rates for a larger crude carrier capable of carrying 200,000 to 300,000 tons of cargo on a voyage from Valdez to St. Croix *via* Cape Horn would be $24.90 per ton for an American-flag vessel compared with $5.85 per ton for a foreign-flag vessel. *See* Jt. App. at 107-09.



the route of subsidizing the construction of vessels in American shipyards and subsidizing the additional operational costs of an American crew manning the ship by American safety standards.[13]

While most of the Congressional discussions in regard to tanker shipments from Valdez assumed carriage in American-flag vessels, it is clear that this assumption was based on the original belief that Alaskan crude would be transported to and refined in West Coast ports.[14] The coastwise laws of the United States would then have unquestionably required the transport to be in American bottoms,[15] and this would also be true if the transport of Alaskan crude were from Valdez to, say, Delaware. It was the introduction of the St. Croix refinery in the Virgin Islands into the processing of Alaskan crude which first arguably made possible the use of foreign-flag vessels to carry the cargo.[16]

On 3 October 1969 plaintiff Shipbuilders Council inquired of the Commissioner of Customs as to whether Alaskan crude could, under the coastwise laws, be trans-

[13] No question concerning subsidies of American-flag ships involved in foreign commerce, however, is raised by this case. The *Hercules* is a foreign-flag vessel, Valdez is an American port, and this case concerns the legality of deployment of foreign-flag vessels to carry oil between American ports and the U.S. Virgin Islands.

[14] *See* TAN 72 & note 72 *infra*.

[15] *See* TAN 24 & note 24 *infra* (Jones Act proscription).

[16] The Hess Corporation's so-called "Alaskan crude oil refining unit" at St. Croix on the Virgin Islands became operational in 1971 and represented an investment of approximately $80 million. *See* Brief for Appellee Blumenthal at 4. This refining unit was similar to other units already in operation at the Corporation's St. Croix refinery, however, and was adaptable to process crude oil imported from other parts of the world. *Id.*

ported to the Virgin Islands, refined there, and then the products shipped to the United States in tankers not entitled to engage in the coastwise trade; in other words, whether the use of a foreign-flag tanker such as the *Hercules* would violate the Jones Act.[17] In reply the Commissioner referred to "a number of cases involving the transportation of merchandise between coastwise points by way of an intermediate foreign port at which the merchandise underwent some form of processing," and stated that "if the main purpose of the exportation was to have the merchandise thus processed and if the processing was not merely incidental to an intended transportation between American ports," then the prohibition of the Jones Act did not apply and the transportation could be by a foreign vessel.[18] The Commission pointed out that the Bureau of Customs ordinarily considered processing to be "substantial," and thus likely to be the "main purpose" of the exportation, if it "changed the merchandise physically, improved its condition, and advanced it in value, so that after processing it was a new and different product. . . ." [19] No formal ruling from the Customs Service was then forthcoming, but plaintiffs renewed their effort to obtain such ruling at the time of the voyage of the *Hercules* in 1977. The Service responded by issuing formal notice of a proposed amendment to the Customs Regulations, which would provide:

> A coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ("coastwise point") is unladen at another coastwise point, regardless of the origin or ultimate destination of the merchandise. However,

[17] *See* Brief for Appellant Shipbuilders Council app. at 19a.

[18] *Id.*

[19] *Id.* at 19a-20a.



> merchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is, at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.[20]

The Service further explained that where such manufacturing or processing of a product takes place at a non-coastwise point, "either segment (or both segments) of the overall transportation [to and from the non-coastwise point] may be accomplished by vessels not qualified to engage in the coastwise trade" because "the continuity of the transportation is broken at the intermediate port or place and . . . the new and different product resulting from the manufacturing or processing is not the same as that laden at the initial coastwise point." [21]

On 2 September 1977, the day before the *Hercules* was to commence its voyage, plaintiff American Maritime Association sought a temporary restraining order to enjoin the Secretary of the Treasury from permitting the *Hercules*, or any other foreign-flag vessel, from departing Valdez, Alaska, laden with Alaskan crude for the Virgin Islands.[22] The TRO was denied that same day, but because of the imminent voyage, the hearing on motions for preliminary and final injunction was consolidated and tried on 3-4 October. On 13 October 1977 District Judge Gasch ruled that carriage by a foreign-flag vessel of Alaskan oil to the Hess refinery in the Virgin Islands, where the oil would be refined and the

[20] 42 Fed. Reg. 46068 (1977).

[21] *See id.* (supplemental information as background to proposed rule).

[22] *See* Jt. App. at 35-48.

products thereafter shipped to the continental United States, was not a violation of the Jones Act.[23]

## II. The Statutes and Issues

The Merchant Marine Act of 1920, § 27 (the Jones Act) provides:

> . . . *No merchandise* shall be transported by water, or by land and water, on penalty of *forfeiture* thereof, between points in the United States, including Districts, Territories, and *possessions thereof embraced within the coastwise laws, either directly or via a foreign port*, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States. . . .[24]

With regard to the Virgin Islands, however, the above language is qualified by § 21:

> . . . [*T*]*he coastwise laws of the United States shall not extend to the Virgin Islands* of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same.[25] [No party contends such proclamation has ever issued.]

While the parties have argued extensively on the overall purpose of the Merchant Marine Act of 1920, the numerous decisions dealing with the continuity of flow in foreign and interstate commerce[26], and the impact of the Magnu-

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[23] *See American Maritime Association, et al.* v. *Blumenthal, et al., supra*, slip op. at 25.

[24] 46 U.S.C. § 883 (emphasis added).

[25] Merchant Marine Act of 1920, § 21, 41 Stat. 997, as amended by Act of 16 April 1936, Pub. L. No. 74-520, 49 Stat. 1207, ch. 228, 46 U.S.C. § 877 (1970) (emphasis added).

[26] *See* note 54 *infra*.



son Amendment to the Ports and Waterways Safety Act of 1972,[27] we view the problem as one of straightforward statutory construction.

On the facts of this case, the key words of the Jones Act are its flat prohibition: "*No merchandise* shall be transported . . . *between points in the United States* . . . [in foreign vessels] . . ." The central issue, therefore, is whether the "merchandise" (crude oil) transported from Valdez to St. Croix by Hess is so similar to the "merchandise" (refined oil products) subsequently shipped from St. Croix to the continental United States that the processing at St. Croix fails to interrupt an essentially single voyage of the oil from Valdez, Alaska, to the East Coast. If the oil and its by-products are deemed to constitute a single element of "merchandise," then the same "merchandise" travels between Valdez and an East Coast port—*i.e.*, between two "points in the United States"—and is subject throughout that voyage to the prohibitions of the Jones Act. If, on the other hand, the processing at St. Croix effects such a substantial metamorphosis of the oil that an essentially different "merchandise" is transported on the second leg of the trip than on the first, the "single" voyage from Valdez to the East Coast is severed at St. Croix. Because the Virgin Islands are

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[27] The "Magnuson Amendment" was passed as § 401 of Pub.L. No. 93-153, Title IV, 87 Stat. 589 (16 Nov. 1973). The Act is codified in scattered sections of the U.S.C. and the Magnuson Amendment altered various provisions of 46 U.S.C. § 391a(7)(C), earlier enacted as part of the Ports and Waterways Safety Act of 1972, Pub.L. No. 92-340, 86 Stat. 424 (10 July 1972), 33 U.S.C. §§ 1221-27; 46 U.S.C. § 391a (Supp. V 1975). *See* TAN 63-76 & notes 63-76 *infra* (appellant Seafarers Union environmental law argument).

expressly excluded from U.S. coastwise laws,[28] neither of these two sub-voyages would be between two "points in the United States, including . . . possessions thereof embraced within the coastwise laws," [29] and no vessel carrying merchandise on the two voyages would fall within the proscriptions of the Jones Act.

Further, we must consider the argument of appellant Seafarers Union that the Trans-Alaskan Pipeline Authorization (TAPS) Act [30] and the Magnuson Amendment [31] bar the transportation of Alaskan oil in foreign vessels.

We turn first to the issues related to the identity of "merchandise" argument under §§ 21 and 27 of the Merchant Marine Act of 1920, and then consider separately the impact of the TAPS Act.

## III. Applicability of the Merchant Marine Act of 1920

### A. *"Merchandise"—Section 27 (Jones Act)*

Section 27 speaks of "merchandise" being transported.[32] The inquiry thus becomes what merchandise is transported from Valdez to St. Croix and what merchandise is transported from St. Croix to the continental United States? It is clear that the merchandise on the first leg is Alaskan crude oil. If the facts of this case ended

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[28] *See* 46 U.S.C. § 877.

[29] *See* 46 U.S.C. § 883.

[30] "TAPS" Act is a term invented by appellant Seafarers Union to describe Title II of P.L. 93-153. *See* Brief for Appellant Seafarers Union at 5.

[31] *See* note 27 *supra*.

[32] 46 U.S.C. § 883.



with the arrival of the Alaskan crude at the Hess refinery in St. Croix, Virgin Islands, the case would be very simple, because § 21 plainly states, "[T]he coastwise laws of the United States shall not extend to the Virgin Islands"; [33] hence § 27, perhaps the most important of the "coastwise" laws, would not restrict the transport to American vessels.

But the facts do not end at the Hess refinery, for it is there that the Alaskan crude is refined into eleven products, which are then largely transported to the continental United States.[34] Appellants contend that the two voyages must be considered as one and that the petroleum, whether in crude or refined form, must be thought of as one product, *i.e.*, one type of "merchandise" within the statute. It is only on this theory that the Jones Act (§ 27) can apply to this case, *i.e.*, if the "merchandise" transported from Valdez to St. Croix is the same "merchandise" subsequently transported to the continental United States, and if the two legs of the voyage thus must be treated as one.

We cannot agree with this concept, because crude oil is simply quite different from the ultimate products which come out of a refinery. Judge Gasch found that:

> Alaskan oil that is refined at the Hess refinery will yield the following products in the following amounts:

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[33] 46 U.S.C. § 877.

[34] There is no evidence in the record indicating specifically how oil imported from Alaska for refining at the Virgin Islands is marketed. But the record does indicate how oil with which the Alaskan oil is commingled at the Hess refinery has been marketed in a representative period. *See* TAN 6 & note 6 *supra*.

| Product | % Volume | |
|---|---|---|
| benzene | 47 | |
| toluene | 2.23 | |
| xylene | 0.27 | |
| paraxylene | 1.08 | |
| regular gasoline | 4.19 | |
| premium gasoline | 4.19 | |
| unleaded gasoline | 3.00 | |
| jet fuel | 8.70 | |
| No. 2 Oil | 14.50 | |
| No. 6 Oil | 55.82 | |
| sulfur pellets | 0.30 | |
| | 94.75 | total marketable product recovery |
| | 5.25 | fuel gas equivalent |

Benzene, toluene, xylene and paraxylene are petrochemicals used in the manufacture of finished chemical products. Jet fuel is used as fuel for jet aircraft, and gasoline as fuel for motor vehicles. Sulphur is used in the manufacture of fertilizers and pharmaceuticals. No. 2 oil is used as home heating oil. No. 6 oil is used as fuel by power plants. *Each of these products is different in name, physical and chemical character, and use from each other and from crude oil. Moreover, crude oil cannot be used for any of these purposes.*[35] (Emphasis added.)

We agree with the trial court's conclusion that "all the credible evidence of record conclusively demonstrates that the products of the Hess refinery are new and different merchandise from the Alaskan crude oil."[36] It thus seems clear that the "merchandise," the language of the statute, transported between Valdez and St. Croix is one thing, crude oil, while the "merchandise" transported from St. Croix to the continental United States is a collection of quite different other things, *i.e.*, products which are physically, chemically, and usefully different from the original crude oil.[37] Assuming that the exception of § 21,

[35] *American Maritime Assoc., et al.* v. *Blumenthal, et al., supra,* slip op. at 23-24 (footnotes omitted).

[36] *Id.* at 24.



[37] *Id.* at 24. *See also* Brief of Appellee Hess Corp. at 5 (listing various products distilled and processed from crude oil at St. Croix refinery). *Cf. Shell Oil Co. of Canada, Ltd.* v. *United States,* 27 C.C.P.A. 94, 100 (1939) (separation of constituent materials of crude petroleum is a process of manufacture that creates new product subject to import tax).

It is conceded, as alleged by one appellant, that this "same" or "different" test involves semantic concerns. *See* (Reply) Brief for Appellant Shipbuilders Council at 4. But the task of construing words of a statute and applying those words to an actual commercial situation, in light also of policy concerns and the reasonableness of a statute's particular application, is precisely what we are called upon to do in this case. The task is a recurrent one for lawyers, and though the relevant considerations may be "abstract," *see id.*, they are decidedly not "irrelevant."

Appellant argues, for example, that the process of refining oil is insignificant because it merely "separates . . . molecules according to their boiling points" and leaves the fundamental physical "matter" of the oil the same. *See id.* at 3. The issue, it is contended, is reducible merely to "whether one regards the whole (crude oil) as being more or less than the sum of its parts (the products)." *Id.* at 3-4. We would state the question differently. The issue is not whether the whole of a particular substance is *more or less than its parts,* but whether after a refining or manufacturing process which, for example, breaks the substance down into constituent elements or combines it with other elements to create new substances, the product remains largely the *same* in such respects as form, composition, value or function.

In a complex physical world in which matter is constantly being transformed into other forms, appellants' simplistic argument concerning the identity of physical "matter" after a refining process would prove too much. It would compel the conclusion that because of the innumerable forms which matter may take, no degree of transformation of one good into another changes the essential nature of that good and its by-products. For practical and commercial purposes, how-

"[t]he coastwise laws of the United States shall not extend to the Virgin Islands," applies in full vigor, then each voyage, carrying different merchandise, is between a point within the coastwise laws of the United States and a point outside the coastwise laws of the United States. We hold that the requirement of the Jones Act that the cargo be carried in American vessels does not apply to either voyage; each is outside the coastwise trade of the United States.[38]

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ever, this is not correct. In commercial usage, for example, sea water is not the same as the hydrogen, oxygen, and various chemicals and minerals into which it can be broken down, and a soft drink bottled for sale is not the "same" as the water, sweeteners, and other substances from which it is made. Of course the opposite argument can also be taken too far: that even the slightest alteration of a substance (for example, perhaps, the mere bottling of spring water) effects a "new and different product."

Thus the precise point at which a substance subjected to an altering process becomes "different" eludes simple definition; attempts at a universal description would lead into metaphysical realms which a court should fear to enter. But we submit that along a spectrum of possible change for any particular item, there exists a point—determinable perhaps only through experience and subject to change through time and circumstance—at which that item, when altered in some substantial respect, becomes new and different. The fact, for example, that the oil in the present case may increase little in market value after processing, *see* Brief for Appellant American Maritime Association at 5, is not dispositive, because value is only one of the considerations that a court must make in determining if a product has changed through processing. Common sense and experience—the best guides to courts—will aid the determination of the point at which substantial change has occurred in particular cases.

[38] This holding should come as no surprise to appellants, since it coincides with their own, earlier interpretation of the implications of the Merchant Marine Act for the Virgin Islands oil trade. *See* TAN 57 & note 57 *infra* (statement of



Further, under the circumstances of this case, we hold that it is not the *intent* of a shipper to send goods to a final destination that governs, but the degree to which the goods are altered *in fact* in the course of commercial dealings.[39] Thus we must reject appellants' contention

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Executive Director of appellant American Maritime Association).

This holding also is consistent with "letter rulings" of the Customs Service in the past on transshipment issues under the Jones Act. These rulings, though addressed to individuals and not developed through adversarial or any form of rulemaking proceedings, are binding on the agency, *see* 19 C.F.R. § 177.9, and merit some deference by a reviewing court, *see Gulf Oil Corp.* v. *Hickel*, 140 U.S.App.D.C. 368, 372, 435 F.2d 440, 444 (1970). *See generally Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (statutory interpretation by an agency responsible for the administration of that statute is entitled to great weight). In these rulings the degree to which a product has been altered by processing at the point of transshipment has generally been dispositive of whether the continuity of its transportation has been broken at that point and of whether the product, for purposes of the Jones Act, is the same or different "merchandise" upon re-entry to the United States. *See* rulings of 17 Oct. 1938; 15 Jan. 1963; 6 July 1964; 9 Sept. 1964; 22 Nov. 1968; 18 March 1969; 7 July 1969; 6 Oct. 1971; 12 Feb. 1975; rulings *reprinted in* Brief for Appellant Shipbuilders Council app. at 3a-30a. *Cf.* Schedule 8, Part 1, of the Tariff Schedules of the United States, 19 U.S.C. § 1202 ("Any product of the United States which is returned after having been advanced in value or improved in condition abroad by any process of manufacture or other means, or any imported article which has been assembled abroad in whole or in part of products of the United States, shall be treated for the purposes of this Act as a foreign article. . . .").

[39] Similarly, in construing the predecessor statute to the present Jones Act, the Ninth Circuit stated in *United States* v. *250 Kegs of Nails*, 61 Fed. 410, 412 (9th Cir. 1894) (emphasis added):

> . . . *The purpose the parties had in view can make no difference with the interpretation of the statute.* They practiced no concealment or fraud upon the government. Their acts were done openly. They had the statute before them

that because Hess may have intended that most of the crude oil shipped from Valdez return in some form to the mainland United States—in fact, that it was bound by law not to sell it abroad [40]—the prohibitions of the Jones Act apply.[41] The enforcement provision cited by appellants which applies the penalty of forfeiture where there is "intent to evade" foreign vessel prohibitions [42] does not define under what circumstances evasion takes place. Such definition is provided in the substantive provisions of the Jones Act itself, which speaks not of *intent* but of actual "transport" of "merchandise." Since appellants have not contended in this case that in the absence of an actual violation of the Jones Act the forfeiture provisions should apply, and since no evidence has been adduced of any intent by Hess to evade the Act absent such actual violation, the issue of intent does not govern this case.

B. *"Via a Foreign Port"—Section 27 (Jones Act)*

Two other points should be noticed in regard to our interpretation of § 27. The words "either directly or via a foreign port" [43] were inserted in the original stat-

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for their guidance. . . . The statute left them free to ship goods . . . in any manner they saw fit, save and except the manner therein prohibited.

[40] *See* note 9 *supra*.

[41] *See, e.g.*, Brief for Appellant Shipbuilders Council at 4-5.

[42] *See* Act of 17 June 1930, ch. 497, title IV, § 588, 46 Stat. 749, 19 U.S.C. § 1588 (1976).

[43] *See* 46 U.S.C. § 883. Because of the explicit exemption of the Virgin Islands from the coastwise laws, the Virgin Islands are, *for the limited purposes of the Jones Act*, analogous to a "foreign port." *See id.* This point is conceded by one of the appellants, *see* Brief for Appellant Shipbuilders Council at 3, but disputed by another, *see* Reply Brief for Appellant American Maritime Association at 23. Disagreement concerning the precise term of identification to be applied to the



ute [44] by the Congress in 1893,[45] after the decision in *United States* v. *250 Kegs of Nails*.[46] In that case the Government sought forfeiture of 250 kegs of nails which had been transported in a Belgian vessel from New York to Antwerp, there unloaded and reloaded upon a British vessel, which then transported the same nails (*i.e.*, the same merchandise) to California. The statute then in effect did not contain the phrase "either directly or via a foreign port." Both the District Court and the Ninth Circuit found the statute inapplicable to the transportation of the nails, because "[i]n the plain and ordinary meaning of the words, 'to transport goods from one domestic port to another' means 'to carry goods *in one continuous voyage*. . . . It does not mean to carry them in two distinct and separate voyages, or in two distinct vessels. . . ." [47] Congress, seeing how easily the protection to American shipping would be vitiated by a simple transshipment of the same cargo, inserted the words "either directly or via a foreign port" to prohibit such simple transshipment.

The legislative history of the "via a foreign port" amendment shows the limited purpose of Congress, only to

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Virgin Islands in this context is merely academic, however, for the words of the statute suffice to resolve the issue at hand. Merchant Marine Act of 1920 § 21 excludes the Virgin Islands from the "coastwise laws of the United States," *see* 46 U.S.C. § 877, and thus withdraws the Islands from the prohibitions of the Jones Act, which by its own terms applies only to transportation of merchandise to points "within the coastwise laws" of the United States, *see* 46 U.S.C. § 883.

[44] *See* Act of 1 March 1873, 17 Stat. 483, § 4347 Revised Statutes, as amended 3 March 1883, 22 Stat. 641.

[45] Act of 15 February 1893, ch. 117, 27 Stat. 455.

[46] 61 Fed. 410, *supra*, *aff'g*, 52 Fed. 231 (S.D. Cal. 1892).

[47] *United States* v. *250 Kegs of Nails*, *supra*, 61 Fed. at 411 (emphasis added).

extend coverage to the type activity involved in *250 Kegs of Nails*; the debates did not even refer to merchandise that was to any degree processed in a foreign country.[48] No language in the statute indicates that the landing of the cargo in a foreign port for the legitimate purpose of manufacture or processing of the goods would not convert the goods to other merchandise or would not interrupt the continuity of the voyage.[49] The words "either directly or via a foreign port" have reference only to the *Keg of Nails* situation, *i.e.*, the simple transshipment of the same goods in a foreign port, which under the amended statute does not break the continuity of the voyage. What we have here in the operations of the St. Croix refinery is a far different undertaking from simple transshipment of the same "merchandise."

C. *"Forfeiture"—Section 27 (Jones Act)*

The last point to be made in regard to § 27 is the implication derived from the penalty of *forfeiture* for a violation of carrying cargo by non-U.S. vessels in the coastwise trade. It is well understood that statutes imposing a forfeiture, particularly the horrendous penalty of forfeiture of an entire cargo worth millions of dollars, are to be construed strictly.[50] The rationale for such strict

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[48] Legislative debate focused only on the issue of transshipment without reprocessing, where a vessel "without breaking bulk or . . . cargo" could merely "call at" a foreign port and then return to the United States. *See* 39 CONG. REC. 1416, 1488 (1893).

[49] As the Ninth Circuit stated in *United States* v. *250 Kegs of Nails, supra*, 61 Fed. at 412: "[The shippers of the goods] had the right to assume that the whole intention of congress had been expressed in the words of the statute."

[50] *See id.* at 413 (in construing an ambiguous statute, doubt must be resolved against forfeiture). *See also United States* v. *One 1936 Model Ford Coach*, 307 U.S. 219. 226 (1939);



construction—that persons should receive clear and unequivocal warning before facing exposure to harsh penalties [51]—is especially applicable here, where the penalty for noncompliance is enormous.[52] The application of this principle is not undercut by the argument, strenuously urged by the appellants, as to the applicability of numerous judicial precedents involving the flow of interstate and foreign commerce. It is also well understood that such statutes of a regulatory nature are to be construed broadly, and appellants urge that this applies to the Jones Act in this case.[53]

We do not agree; the Jones Act is an Act for a very specific purpose, with sharply defined contours, and the forfeiture provision is a strict penalty for a violation of such a limited and sharply defined statute. In its effect the Jones Act, though pertaining to commerce, thus bears a closer resemblance to other penal statutes than it does to statutes generally regulating commerce. Decisions construing regulatory statutes broadly, from their

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*Howard* v. *Federal Crop Ins. Corp.*, 540 F.2d 695, 697 (4th Cir. 1976); *The Snapper King*, 127 F.2d 490, 491 (5th Cir. 1942); *United States* v. *Worthington*, 117 F.2d 936, 937 (9th Cir. 1941); *Kane* v. *McDaniel*, 407 F.Supp. 1239, 1242 (W.D. Ky. 1975); *United States* v. *One 1947 Oldsmobile Sedan*, 104 F.Supp. 159, 161 (D. N.J. 1952); *Warner* v. *United States*, 157 Ct. Cl. 1 (1962); C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 58-60 (1974), and cases cited therein.

[51] *See, e.g., United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, 234-37 (1966) (Harlan, J., dissenting).

[52] *See* Brief of Appellee Hess Corp. at 4 (*Hercules* cargo worth $20 million).

[53] *See, e.g.*, Reply Brief for Appellant American Maritime Association at 6-9.

very nature and purpose, are of doubtful applicability.[54]

[54] The court also must reject appellants' argument, urged at length, that the present case is governed by domestic commerce clause cases. *See, e.g.*, Brief for Appellant American Maritime Association at 25-32; Brief for Appellant Shipbuilders Council at 32-33. To support the contention that the refining of oil at St. Croix fails to interrupt the flow of that oil between points in the United States for purposes of the Jones Act, appellants cite the venerable line of early twentieth century cases which sustained congressional power to regulate allegedly intra-state economic activity because of the flow of subject goods in inter-state commerce. *See, e.g., Bd. of Trade of the City of Chicago* v. *Olsen*, 262 U.S. 1 (1922) (federal regulation of grain traders upheld despite interruption of transit of grain within state for storing and processing); *Stafford* v. *Wallace*, 258 U.S. 495 (1922) (acceptable federal regulation of cattle slaughtered in Chicago before reshipment of meat products to the East); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 526 (1911) (food stuffs of local manufacturers subject to federal regulation because of sale for export); *Swift & Co.* v. *United States*, 196 U.S. 375 (1905). But in citing such authority, appellants misconceive the issue of the present case.

The issue here is not whether Congress has the power to regulate a particular flow of commerce, but whether it has *exercised that power* in a particular case. The fact that an interruption to the flow of goods in inter-state commerce does not oust federal regulatory power does not suggest that Congress intended that all regulatory statutes it enacts in the commercial area be applied to every imaginable perambulation of commercial goods. Though manufacture or processing of a product may be too "incidental" to interrupt the flow of commerce generally, such alteration in the nature of the goods may yet be substantial enough to exempt those goods from the intended reach of a particular statute. If Congress wishes to confine the shipping of Alaskan oil to American vessels, it may do so; if it wishes to lift the Virgin Islands exception from the coastwise laws, it may do so; and if Congress wishes to set conditions to the mode of re-entry to this country of goods manufactured abroad of American components, doubtless it may do so. But it has *not* yet done these things, and it is not for this court to construe a statute passed for more limited purposes so as to assume these tasks itself.



D. *Policy Concerns Behind the Virgin Islands Exemption—Section 21*

There is another and stronger reason why the long line of unquestioned authority in regard to interstate and foreign commerce should not govern our interpretation of §§ 21 and 27 of the Merchant Marine Act of 1920. No one here contends that the flow of crude oil from Prudhoe Bay and then in the form of gasoline to the gas tank of the ultimate consumer anywhere in the continental United States is not domestic, interstate U.S. commerce. Such flow of commerce can be considered to take place through foreign ports, and through ports outside of the coastwise trade, even though the substances involved go through numerous transformations. This process is all in the flow of commerce, no one here contends otherwise, and Congress regulates this commerce in a myriad of ways.

But what we have here is a statute which regulates the coastwise trade, defines very strictly what is covered within the coastwise laws, and in so doing excludes the Virgin Islands from the coverage of the coastwise laws, all for the very specific purpose of insuring that American-flag shipping has a monopoly on the carriage of goods in the coastwise trade. However, for reasons clear to Congress at the time, and probably for additional and different reasons equally clear to Congress later, the Virgin Islands have been excluded from the application of the coastwise laws, and have continued to be so excluded for many years, for national policies quite separate from those justifying the Jones Act restriction of carriage in American-flag vessels.[55] If Congress wishes to bring the

[55] Substantial economic and political interests both oppose and support this policy. The trial judge in the present case acknowledged, for example, that continued use of foreign vessels by petroleum companies involved in the Virgin Islands trade would injure the American marine industry. He noted that because of lower costs of foreign flag tankers, "a sub-

Virgin Islands into the ambit of the U.S. coastwise trade, it can do so, and in fact has already left the decision up to the President to do so if the President so desires.[56]

The plaintiff-appellants themselves have recognized the long-standing interpretation of the Customs Service of the statute placing the Virgin Islands outside the coast-

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stantial amount of trade will be diverted from the American shipping industry" and "American ship owners and operators, shipbuilders, and seamen will lose significant business and suffer economic harm." *American Maritime Association, et al.* v. *Blumenthal, et al., supra,* slip op. at 9. The petroleum industry, on the other hand, has an interest in controlling costs and in making full use of existing refinery facilities, *see* Brief of Appellee Hess Corp. at 4-5 (describing costly investments in refineries on St. Croix), and presumably the Virgin Islands and business and other interests associated with the Islands have an interest in continuing to enjoy the stimulative effect on Virgin Islands commerce of the coastwise laws exemption. The economic and other interests at stake may have been quite different in 1936 when the Merchant Marine Act was amended to provide for that exemption. *See Hearings on S. 754 before the House Committee on Merchant Marine and Fisheries,* 74th Cong., 2d Sess. 8 (26 March 1936) (testimony of E. Gruening for Dep't of Interior) (purpose of exemption to enhance "bunkering" trade on St. Thomas Island); *id.* at 21 (testimony of Governor of Virgin Islands) (no purpose to affect "underlying economy" of St. Croix). Yet the relevant consideration today is that economic development has occurred and substantial investments made in reliance on this exemption, which both Congress and the President have seen fit to keep in force. *See* note 56 *infra* (statutory role of President).

[56] The President plays a decisive role in the continuing exemption of the Virgin Islands from the coastwise laws because the Merchant Marine Act of 1920 provides for such exemption "until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same." 46 U.S.C. § 877. The President to date has issued no such proclamation. This delegation of authority by Congress to the President, however, provides a second focus for attempts to lift that exemption through political channels.



wise laws; *i.e.*, goods processed there originate for the next leg of their seaborne transportation outside the restriction of the Jones Act. In 1971 the Executive Director of appellant American Maritime Association, in connection with this statutory exemption for the Virgin Islands, advised a colleague, "[T]he present situation permits foreign-flag tankers to carry crude oil from, say, Alaska, to be refined on the islands and then transshipped, again by foreign flags, to the East Coast."[57] As recently as February 1976, representatives of all three appellants here testified or submitted statements to Congress in support of a bill which would amend coastwise laws to extend them to the Virgin Islands with respect to the transportation of crude oil, residual crude oil, and refined petroleum products.[58] This was but one of at least ten unsuccessful attempts to have the exemption modified or repealed.[59]

It is quite apparent that there are strong policy arguments, economic and political, dictating that the Virgin Islands exemption from the coastwise laws remain. Two tankers the size of the *Hercules,* transporting almost 220,000 tons of crude each, operating in full service the year around from Valdez to St. Croix, would only bring to the Hess refinery 5% of its annual output.[60] All the other crude comes from sources outside the United States,

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[57] *See* letter of 15 September 1971, *reprinted in* Jt. App. at 926.

[58] *See Hearings on S. 2422, "An Act to Amend the Merchant Marine Act of 1920,"* 94th Cong., 1st Sess. (1976).

[59] *See* H.R. 12886, 92nd Cong., 2nd Sess. (1972); H.R. 13530, 93rd Cong., 2d Sess. (1974); S. 2422, 94th Cong., 1st Sess. (1975); H.R. 13251, H.R. 14463 and H.R. 14751, 94th Cong., 2nd Sess. (1976); H.R. 1039, H.R. 3046, H.R. 8761 and H.R. 9883, 95th Cong., 1st Sess. (1977).

[60] *See* Brief of Appellee Hess Corp. at 4-5 (describing output of St. Croix refinery).

is transported in either foreign-flag or U.S.-subsidized vessels to St. Croix, and is then transported in either foreign-flag or U.S.-subsidized vessels from St. Croix to the continental United States. In addition to petroleum and its products, there are large cargoes of rum and sugar which flow from the Virgin Islands to the United States in foreign bottoms. If the economics and politics of the matter call for the inclusion of the Virgin Islands in the coastwise trade of the United States, then all of this would have to be carried in American-flag ships. Obviously, there are large and conflicting economic and political interests both opposing and supporting the continuation of the Virgin Islands exemption from the coastwise laws; it all adds up to a policy choice for Congress, not any court, where the language and intent of the statute are as clear as they are in this case.

We appreciate the fact that appellants here do not petition this court to lift, by fiat, the Virgin Islands exemption. Rather, appellants aim more narrowly to invoke the prohibitions of the Jones Act only against foreign vessels involved in the transport of crude oil from the mainland United States to the Virgin Islands, where petroleum products refined from that same oil are transported back to the mainland. Yet we believe that to grant appellants' petition, even on the narrow facts of the Alaskan crude oil trade, would inevitably jeopardize the export from the Virgin Islands to the United States not only of petroleum products refined from mainland oil, but of *all* products manufactured or processed in the Virgin Islands of constituent elements brought from the United States. For we are not convinced that the facts of the Alaska crude oil trade, or of the petroleum trade generally, are so particularized as to distinguish that trade from other forms of trade carried on between the Virgin Islands and the United States.[61]

[61] The only special factors that can be cited with regard to the Alaskan crude oil trade are export restrictions on Alaskan oil, *see* note 9 *supra*, and environmental laws specially enacted to guard against environmental injury from the Alaskan oil trade, *see* TAN 63-76 & notes 63-76 *infra*. But export restrictions are not unique to Alaskan oil and do not, in any event, apply to the Virgin Islands, which has the peculiar status of a "possession" of the United States exempt from U.S. "coastwise laws." Though these export restrictions do have the effect of ensuring that oil shipped by Hess does not enter the stream of foreign commerce, this fact is relevant only to the question of the shipper's intent concerning eventual destination of carried goods—a consideration which we have stated elsewhere is irrelevant to the present case. *See* TAN 39-42 & notes 39-42 *supra*. We also find that the environmental laws cited by appellant Seafarers Union have no bearing on the present case, *see* TAN 63-76 & notes 63-76 *infra*, and that those laws certainly do not distinguish Alaskan oil from other goods carried to and from the Virgin Islands.



Even more significantly, a holding favorable to appellants in this case would jeopardize innumerable foreign industries, in lands other than the Virgin Islands, that rely both on American sources of supply for raw materials and on the vast American market for re-export. For a holding in favor of appellants would seriously undermine the general proposition, on which significant sectors of world trade rely, that goods exported from the United States to undergo substantial processing or manufacture abroad before re-entering the American market are, upon their re-entry, new and different products not subject to the Jones Act prohibition.[62]

[62] The total amount of foreign commerce at stake is enormous. In 1976, for example, imports to the United States of articles manufactured from previously-exported raw materials were valued at $455,438,012, and imports of articles merely assembled abroad from U.S.-made components were valued at $5,248,588,846. *See* Brief of Appellee Hess Corp. at 18 n.11, *citing Foreign Trade Imports*, Bureau of Census Report IA 245-A, at 30, 148 (1977). Thus the total value in 1976 of United States foreign commerce involved in round-trip processing or manufacture, similar to that of the crude oil here, was nearly $6 billion. *See also* Reply Brief for Appellant

In a world of increasingly complex and interdependent patterns of commerce, no court should rush without clearest guidance from other, accountable branches of Government to erect new and formidable trade barriers. Though appellants here seek a limited decision, we believe that the decision they seek could not logically or practically be bound to its particular facts and that its effects could bring serious harm to the foreign commerce of the United States and to other foreign shores and markets. For compelling reasons of both law and policy, we decline to set in motion such an unwarranted and unwanted train of events.

## IV. The Non-Applicability To This Case of the Magnuson Amendment to the Ports and Waterways Safety Act of 1972

In addition to the argument advanced by appellants American Maritime Association and Shipbuilders Council, the Seafarers Union contends that "quite apart from the Jones Act, for environmental purposes, the carriage of TAPS [63] oil in the coastwise trade is confined to American vessels and . . . the carriage of that oil by foreign tankers in the coastwise trade is illegal." [64] Seafarers draws this argument from the Magnuson Amendment,[65] which was introduced to advance the date for

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American Maritime Association app. at 1a-3a (statistical appendix of selected U.S. exports returned by vessel as imports to the United States after processing, manufacture, or assembling abroad).

[63] *See* note 30 *supra* ("TAPS" Act term invented by Appellant Seafarers Union to describe P.L. 93-153, Title II, the Trans-Alaska Pipeline Authorization Act).

[64] *See* Reply Brief for Appellant Seafarers Union at 2.

[65] § 401 of Pub.L. No. 93-153, Title IV, 87 Stat. 589 (16 Nov. 1973), amending language of 46 U.S.C. § 391a(7)(C).



environmental rules and regulations applicable under the Ports and Waterways Safety Act of 1972 [66] to U.S.-flag vessels in the coastwise trade. This was accomplished by differentiating between foreign and U.S. vessels in the foreign trade on one hand, and U.S. vessels in the coastwise trade on the other, by inserting two clauses and adding a sentence to the existing law, thus (amendment italicized):

> (C) Rules and regulations published pursuant to subsection (7)(A) shall be effective not earlier than January 1, 1974, *with respect to foreign vessels and United States-flag vessels operating in the foreign trade*, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall establish an effective date not later than January 1, 1976, *with respect to foreign vessels and United States-flag vessels operating in the foreign trade*, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate. *Rules and regulations published pursuant to subsection (7)(A) shall be effective not later than June 30, 1974, with respect to United States-flag vessels engaged in the coastwise trade.*[67]

From this Seafarers Union argues that there are only three types of vessels covered: foreign vessels in the U.S. foreign trade, U.S. vessels in the same trade, and U.S. vessels in the coastwise trade—*i.e.*, that there is a singu-

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[66] Pub.L. No. 92-340, 86 Stat. 424 (10 July 1972), 33 U.S.C. §§ 1221-27; 46 U.S.C. § 391a (Supp. V 1975).

[67] 46 U.S.C. § 391a(7)(C).

lar omission of U.S. vessels in the continental United States-Virgin Islands trade, which, by § 21 of the Merchant Marine Act of 1920, is *not* within the coastwise trade.

From this the Seafarers Union further argues that "the TAPS act and particularly its Magnuson Amendment, was an environmental law, not a coastwise law, and that since the Virgin Islands exemption from the Jones Act applied only to the coastwise, cabotage, laws, there was no Virgin Islands exemption in the clear Congressional mandate in the TAPS Act that, for environmental reasons, only American vessels could carry TAPS oil in the coastwise trade." [68] We agree with the Seafarers Union that the Magnuson Amendment dealt with an environmental law, not a coastwise law, but we cannot find the rationale for the rest of its argument.

First, it is clear, as Seafarers Union itself points out, that the environmental provisions of 46 U.S.C. § 391a apply to all vessels entering the navigable waters of the United States which have on board a cargo of oil. This includes, of course, the Virgin Islands.[69] In other words, the ship *Hercules*, of foreign registry, is completely subject to U.S. environmental laws while in U.S. navigable waters near Valdez, the Virgin Islands, or the continental United States. The Ports and Waterways Safety Act of 1972, as amended by the Magnuson Amendment, applies broadly and clearly to "[a]ll vessels . . . which are documented under the laws of the United States *or enter the navigable waters of the United States*. . . ." [70] The

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[68] *See* Reply Brief for Appellant Seafarers Union at 2-3.

[69] *See id.* at 13-14.

[70] 46 U.S.C. § 391a(2) (emphasis added).



*Hercules* is such a vessel, and thus is covered by the amendment and by its environmental provisions.[71]

Second, and fundamentally, the purpose of the Magnuson Amendment had nothing whatsoever to do with restricting foreign vessels in American maritime commerce. True, there is much dialogue on the Congressional floor in regard to the carriage of the Alaskan crude by American vessels in the "maritime leg" of the oil transport, but in every instance brought to our attention, the maritime leg in the contemplation of the speaker was from Valdez to a West Coast continental United States port, where the Jones Act clearly would have required an American-flag vessel to be used.[72] The purpose of the Magnuson Amendment was simply to advance the effective date for rules and regulations in regard to the coastwise trade, pursuant to 46 U.S.C. § 391(a)(7)(A), to be effective not later than 30 June 1974. Actually, since there was a delay in the flow of Alaskan oil through the pipeline, both this advanced date and the effective date for the environmental rules and regulations pertaining to the foreign trade vessels, both U.S. and foreign, arrived before there was any oil to be carried anyway. The Magnuson Amendment thus had no practical effect.

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[71] Further, no evidence has been adduced that the *Hercules* was in violation of any of those provisions. *See* Brief for Appellee Hess Corp. at 39.

[72] *See, e.g.*, 119 CONG. REC. 27641 (1973) (statement of Rep. G. Ford in House debate) (trans-Alaska pipeline oil to be shipped "from the Alaskan port of Valdez to the west coast"); *id.* at 27648 (statement of Rep. Moorhead) (tankers to transport "oil treasure from Valdez to our west coast ports"); *id.* at 22228 (statement of Sen. Gravel) (tankers to journey "from Valdez to Washington or California"). *See also Environmental Setting Between Port Valdez, Alaska, and West Coast Ports*, III FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED TRANS-ALASKA PIPELINE, U.S. DEPARTMENT OF THE INTERIOR (1972).

Third, no negative inference can be drawn from the arguable omission of the *Hercules* and like vessels from the reach of the amendments. In light of the Virgin Islands exemption from United States coastwise laws,[73] a vessel transporting goods from the mainland United States to the Virgin Islands arguably is engaged in an anomalous species of "foreign trade," [74] and thus falls within the class of "foreign vessels . . . operating in the foreign trade" to which the Magnuson Amendment specifically applies.[75]

Finally, fundamentally, and devastatingly, there is not one word in the Magnuson Amendment or any part of the whole TAPS Act which explicitly commands that only U.S.-flag vessels be used in the transport of Alaskan crude. The Virgin Islands exception to the Jones Act is not cited and is certainly not repealed by these environmental amendments. The most that can be said, and really this is all Seafarers' brief says, is that various Congressmen *assumed* that, because of the requirements of the Jones Act and because they were thinking in terms of West Coast U.S. ports, only American vessels would be involved in the transport of Alaskan crude to the United States. But this assumption was never written into law, and it is highly doubtful, given the obvious powerful economic and political forces lined up on either side of the Virgin Islands exemption from the coastwise laws question, whether it could have been. Certainly all efforts to repeal the Jones Act Virgin Islands exemption have failed, as discussed above.[76]

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[73] 46 U.S.C. § 877.

[74] *See* note 43 *supra* (for limited purposes, Virgin Islands analogous to a "foreign port").

[75] 46 U.S.C. § 391a(7)(C).

[76] *See* TAN 59 & note 59 *supra*.



In summary, if the TAPS Act and the Magnuson Amendment particularly are considered as separate statutes with a separate environmental purpose, as appellant urges and which we agree, then there is not one word in that statute which restricts the carriage of Alaskan crude oil to American-flag vessels. To find such a restriction in the United States Code, one must resort to the Merchant Marine Act of 1920, and there one simultaneously finds the exemption of the Virgin Islands from the coastwise trade, without which the coastwise trade restriction would otherwise govern the carriage of Alaskan crude from Valdez to any U.S. territory port. The Magnuson Amendment simply has no application to this case.

For the reasons set forth above, the case is

*Affirmed.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil 77-1508

No. 77-1934

[Filed November 2, 1978]

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AMERICAN MARITIME ASSOCIATION,
*Appellants*

SHIPBUILDERS COUNCIL OF AMERICA,
SEAFARERS INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury, ET AL.

77-1962

AMERICAN MARITIME ASSOCIATION,
SHIPBUILDERS COUNCIL OF AMERICA,
SEAFARERS INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,
*Appellants*

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury, ET AL.



77-1970

AMERICAN MARITIME ASSOCIATION,
SEAFARERS INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO
SHIPBUILDERS COUNCIL OF AMERICA,
*Appellants*

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury, ET AL.

Appeals from the United States District Court
For the District of Columbia

Before: BAZELON, McGOWAN and WILKEY, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court on appeal herein is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: November 20, 1978

Opinion for the Court filed by Circuit Judge Wilkey

## APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 77-1508

AMERICAN MARITIME ASSOCIATION,
*Plaintiff*

and

SHIPBUILDERS COUNCIL OF AMERICA,
*Intervening Plaintiff*

and

SEAFARERS INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,
*Intervening Plaintiff*

v.

MICHAEL BLUMENTHAL, Secretary of the Treasury,
*Defendant*

and

AMERADA HESS CORPORATION,
*Intervening Defendant*

Oct. 14, 1977

Allan Abbott Tuttle and John Oberdorfer of Patton, Boggs & Blow, Joseph A. Klausner, Washington, D.C., for American Maritime Ass'n.

Richard E. Schwartz, Collier, Shannon, Rill, Edwards & Scott, Washington, D.C., for plaintiff-intervenor, Shipbuilders Council.



Howard Schulman, Schulman, Abarbanel & Schlesinger, New York City, for plaintiff-intervenor, Seafarers Intern. Union of North America, AFL-CIO.

Dennis A. Dutterer, Asst. U.S. Atty., Washington, D.C., for defendant Blumenthal.

Everett B. Birch, Birch, DeJongh & Farrelly, Charlotte Amalie, V. I., and Mark P. Schlefer, Kominers, Fort, Schlefer & Boyer, Washington, D.C., for defendant Amerada Hess Corp.

(All out of town counsel admitted pro hac vice).

### MEMORANDUM

GASCH, District Judge.

This case came before the Court on plaintiffs' motion for a temporary restraining order and preliminary injunctive and declaratory relief. The plaintiffs are the American Maritime Association (AMA) and intervenors Shipbuilders Council, and Seafarers International Union of North America, AFL-CIO (Seafarers Union). Defendants are Michael Blumenthal, Secretary of the Treasury, and intervenor Amerada Hess Corporation (Hess). On September 2, 1977, plaintiff AMA sought a temporary restraining order to enjoin the Secretary of the Treasury from permitting the Hercules, a foreign-flag vessel, or any other foreign-flag vessel from departing Valdez, Alaska, laden with Alaskan crude oil for the Virgin Islands, where the oil will be processed and thereafter shipped to the United States mainland. Judge John H. Pratt of the Court denied the TRO on September 2, 1977. This Court ordered, with the consent of counsel pursuant to Fed.R.Civ.P. 65(a)(2), that the hearing on the motion for preliminary and final injunctive relief be con-

solidated.[1] This matter having been tried to the Court on the 3rd and 4th of October, 1977, the Court makes the following findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

## FACTUAL BACKGROUND

Defendant-intervenor Amerada Hess Corporation, a Delaware Corporation, and its subsidiaries are engaged in the exploration, production, purchase, transportation, and sale of crude oil and natural gas as well as the manufacture, purchase, transportation, and marketing of petroleum products. Of the two refineries that Hess presently owns, only the Virgin Island refinery, with its deep-water port, is accessible by water. It has a present design capacity of about 700,000 barrels of crude oil per day and represents a capital investment of approximately $650,000,000. Hess owns or has under charter approximately thirty-eight foreign-flag and seven United States-flag tankers.

In 1969, after having acquired .5% interest in the Prudhoe Bay field on the North Slope of Alaska, Hess expanded its refinery facility to increase its daily refining capacity by 160,000 barrels per day. In September of 1969, following press reports of Hess' intention to charter four foreign tankers to transport Alaskan crude oil to the Virgin Islands, Edwin Hood, President of the Shipbuilders Council of America, requested a ruling from the United States Customs Service as to whether the above-described transport would violate the Jones Act, 46 U.S.C. § 883 (1970), which, in brief, requires that transportation of merchandise by water between points

[1] The parties represented to the Court that the voyage from Valdez to the Virgin Islands *via* Cape Horn takes approximately forty days; the Hercules is scheduled to arrive in the Virgin Islands on or about October 13th. In light of this fact, the Court consolidated the hearing on preliminary injunctive relief and trial on the merits.



in the United States, "either directly or via a foreign port," be accomplished in American vessels. The Acting Commissioner of Customs responded that a formal ruling could not be issued until a specific case was presented to the agency. However, he offered a preliminary view that such transportation would not violate the Jones Act, 46 U.S.C. § 883 (1970).

In late August of 1977, Edwin Hood was apprised of a "specific case." He informed the Customs Service that the Hercules, a foreign-flag tanker chartered by Hess, was scheduled to load at Valdez and requested a Customs ruling on this matter. The Customs Service responded on September 7, 1977, after the Hercules had departed from Valdez, that it intended to propose rulemaking on this matter.

On September 2, 1977, plaintiff American Maritime Association filed an application for a temporary restraining order prohibiting the Secretary of the Treasury, Michael Blumenthal, from approving departure of the Hercules from Valdez. The Hercules, a ship of Liberian registry, was chartered by a subsidiary of defendant Amerada Hess Corporation, the American Hess Shipping Corporation, to transport approximately 1,466,000 barrels of crude oil having a value of approximately twenty million dollars from Valdez, Alaska, to the Virgin Islands.[2] In particular, plaintiff sought to enjoin the Secretary from (1) issuing to the Hercules or any other foreign-flag tanker a permit, pursuant to 46 U.S.C. § 313 (1970), or a clearance, pursuant to 19 C.F.R. § 4.84 (1977), authorizing the transportation of Alaskan crude oil from Alaska to the Virgin Islands; (2) permitting the Hercules or other foreign-flag tanker carrying Alaskan crude oil from entering a port of the Virgin Islands;

[2] Another wholly-owned subsidiary of Hess owns the oil aboard the Hercules. Hess purchased 1,400,000 barrels from Standard Oil of Ohio and obtained the remainder from Hess properties in the North Slope field.

and (3) permitting any ship carrying Alaskan crude oil, which has been shipped to and processed in the Virgin Islands, from entering any port in the United States mainland. Judge Pratt denied plaintiffs' motion for a temporary restraining order.

The Hercules completed loading crude oil on the 3rd of September and departed the following day. Subsequent to the departure, Shipbuilders Council and the Seafarers Union intervened as party plaintiffs, and Amerada Hess Corporation intervened as party defendant.

On September 14, 1977, the Customs Service published a notice of proposed rulemaking in which it advanced the general view that the Jones Act is not violated if:

> at an intermediate port or place other than a coastwise point (that is, at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.

42 C.F.R. § 46,068 (1977). Plaintiffs contended that the proposed rule would not adequately resolve the legal issues involved in the present case for two reasons. In order to obtain an adjudication on the specific facts presented, plaintiffs must request an advisory ruling from the Customs Service after the rulemaking process is completed. Second, as evidenced by the precedents considered in the notice of proposed rulemaking, the Customs Service would not consider the effect of the Magnuson Amendment to the Ports and Waterways Safety Act, 46 U.S.C. § 391a(7)(C) (Supp. 1977), on the Jones Act.

## LEGAL BACKGROUND

Section 27 of the Merchant Marine Act of 1920, *as amended*, 46 U.S.C. § 883 (1970) (Jones Act), provides in relevant part:



> No merchandise shall be transported by water, or by land and water, on penalty of forefeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States.

The preamble to the Jones Act, 46 U.S.C. § 861 (1970), indicates its underlying policy:

> [I]t is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine. . . . [T]he Federal Maritime Commission and the Secretary of Commerce shall . . . in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

However, Section 21 of the same Act, 46 U.S.C. § 877 (1970), provides that the Virgin Islands is exempt from the application of the Jones Act:

> [T]hat the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for going into effect of same.

The Virgin Islands have remained exempt from the Act, since no United States President has issued such a proclamation. This exemption applies clearly to voyages that begin or terminate in the Virgin Islands. It does not apply to all shipments between points in the United States by way of the Virgin Islands, as this sequence

of shipments may be considered under some circumstances transportation between points in the United States within the meaning of the Jones Act.

The legal issue presented in this case is whether the shipment of oil from Valdez, Alaska, to the Virgin Islands and the subsequent shipment of refined products from the Virgin Islands to the United States mainland is transportation between points in the United States embraced within the coastwise laws. In order to determine this issue, the Court must resolve two questions. As a threshold matter, the Court must determine whether the Magnuson Amendment to the Ports and Waterways Safety Act, 46 U.S.C.A. § 391a(7)(C) (Supp. 1977), implicitly amends the Virgin Islands exemption to the extent that it would not apply if the merchandise involved is Alaska oil. If the Court finds that the Magnuson Amendment does not implicitly limit the application of the Virgin Islands exemption, then the Court must determine whether this shipment of crude oil constitutes two discrete shipments of different merchandise and hence is exempt from the Jones Act, or whether it constitutes one continuous voyage and thus is subject to the Jones Act.

## STANDING

Defendants claim that all three plaintiffs lack standing in that they have failed to allege sufficient "injury in fact." However, it appears to the Court that each plaintiff has satisfied the requisites of standing.

The requirements for standing applicable to this action are set forth in the Administrative Procedure Act, 5 U.S.C.A. § 702 (Supp. 1977). Section 702 grants standing in administrative law cases to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." The Supreme Court in *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), articulated a two-point inquiry in cases where standing is based on Section 702 of the APA: first, the challenged action must have caused the claimant "injury, in fact, economic or otherwise." *Id.* at 152, 90 S.Ct. at 829. Second, the interest sought to be protected must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153, 90 S.Ct. at 830.



The Court of Appeals for the District of Columbia Circuit recently has interpreted each of these points. In *Public Citizen* v. *Lockheed Aircraft Corp.*, 184 U.S.App. D.C. 133, 565 F.2d 708 (1977), the court addressed the meaning of "injury in fact as it pertains to associated plaintiffs. The injury must be palpable, concrete, and immediate. It required a claimant to "show a substantial probability that the requested relief would benefit him in some perceptible, tangible fashion." At 140, 565 F.2d at 715.

Each of the plaintiffs meets the "injury in fact" requirements set forth in *Public Citizen*. Plaintiff American Maritime Association is an unincorporated association of thirty-five independent United States-flag steamship companies that operate vessels in foreign and domestic trade, including those transporting crude oil by tanker from Valdez, Alaska to other ports in the United States. The AMA members presently operate about 1.5 million deadweight tons of tankers. This tonnage represents about one-half of the independent sector of the American-flag tanker fleet[3] and approximately one-fifth of the total unsubsidized Jones Act tanker fleet. It is true that no AMA member presently has available for Alaska trade a tanker equal in size to the Hercules,

[3] The independent sector does not include tankers that are owned by oil companies.

which has a capacity of 216,000 deadweight tons; however, several smaller tankers owned or operated by AMA members are currently "laid up" for lack of cargo and could be available for Alaskan trade.

Plaintiff-intervenor American Shipbuilders Council of America is an unincorporated association of most of the major shipbuilders, shiprepairers and ship component manufacturers in the United States. Twelve of the thirteen shipbuilders capable of building tankers for Alaskan oil trade belong to the Shipbuilders Council.[4] All six of the shipbuilding companies that are capable of building tankers of over 100,000 deadweight tons are members of the Shipbuilders Council.

Plaintiff-intervenor Seafarers International Union of North America, AFL-CIO, is an international union which is affiliated with unions representing in excess of 20,000 seamen employed in deep sea operations of United States-flag vessels, including those transporting oil to ports in the United States. Approximately twelve thousand of its members are eligible to work aboard United States-flag ships. Although its membership does not include all the unlicensed seamen eligible to work aboard Jones Act vessels, affiliates of the Seafarers Union have entered into collective bargaining agreements to man oil tankers owned and operated by American steamship companies. Several U.S.-flag tankers are "laid up" without cargo, because of the unavailability of oil cargo; as a result, union members are unemployed.

Upon the basis of the above facts, each plaintiff has alleged sufficient "injury in fact" to maintain standing. The testimony and papers presented to the Court strongly support the finding that if the instant transportation by foreign-flag tankers is not deemed a violation of the Jones

[4] This figure includes shipyards that build 35,000 deadweight vessels, since vessels that size have been delivered for use in one Alaskan oil trade.



Act, then whenever possible, foreign-flag rather than American-flag ships will be chartered for shipment of Alaskan oil to the Virgin Islands because of lower costs.[5] Thus, a substantial amount of trade will be diverted from the American shipping industry. American ship owners and operators, shipbuilders, and seamen will lose significant business and suffer economic harm.

Since it is impossible to determine in advance which particular ship owner, shipbuilder, or seamen will be harmed in the individual instance, it is not possible to state with certainty which of the members in the plaintiffs' associations will be harmed. Such a showing, however, is not required. *Public Citizen* requires only a showing that the "plaintiffs are within the class of persons whose interests are necessarily, or with substantial probability, affected by the challenged agency action." 565 F.2d at 716. The showing has clearly been established. Conversely, it is apparent that plaintiffs are within the class of people who would benefit if declaratory and injunctive relief were granted.

Moreover, several factors strengthen plaintiffs' standing position. Because plaintiffs seek to enjoin all future transportation of Alaskan oil to the United States *via* the Virgin Islands by foreign tankers, they need only show a substantial probability that at some point in the future one of their members would have been employed to carry the Alaskan oil. An association may maintain standing on behalf of its members, if it sufficiently alleges that its members, or some of them, have suffered "injury in fact." *See Sierra Club* v. *Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Given the nature

[5] The shipping cost of a voyage from Valdez, Alaska to the Virgin Islands *via* Cape Horn is $24.90 per ton for an American vessel and $5.85 per ton for a comparable foreign vessel.

of the relief sought and the number of members each plaintiff association or union represents, it is clear the injury is not remote and is "capable of direct redress by the court through the requested remedy." *Public Citizen*, at ——, 565 F.2d at 715.

Plaintiffs have also sufficiently met the second *Data Processing* standard—the zone of interests test—as recently interpreted by the Court of Appeals for this Circuit in *Tax Analysts and Advocates et al.* v. *Blumenthal*, 184 U.S.App.D.C. 238, 566 F.2d 130 (1977). The court, while acknowledging that the zone of interest is a generous standard, established a means of ascertaining the parties to be within "the zone of interests to be protected or regulated by the statute." The court required district courts to consider the statutory section challenged rather than other sections of the statute to determine the interests that are arguably to be regulated or protected. It noted that this approach was particularly appropriate in the context of the case before it, because the statute involved, the Internal Revenue Code, is extremely complex and does not have a "single, unified purpose." At 245, 566 F.2d at 141. Second, it stated that the interest should be "arguable from the face of the statute." At 250, 566 F.2d at 142.

Upon application of these principles, plaintiff and intervenor-plaintiffs fall within the zone of interests to be protected by the Jones Act. The Jones Act is guided by a unified purpose. It is thus appropriate to examine the preamble to the Act that states the purpose underlying the statute: "It is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine." 46 U.S.C. § 861 (1970). It is apparent that Congress considered American ship owners and operators, shipbuilders, and seamen to be protected by the statute.



The Court therefore concludes that plaintiff AMA and intervenors Shipbuilders Council and Seafarers Union have satisfied the standing requisites.[6]

## AVAILABILITY OF JUDICIAL REVIEW

Defendant Secretary urges dismissal on the ground that plaintiffs have failed to allege that any action or inaction by the Secretary has caused them injury. Defendant apparently contends that there is no final action by the Secretary reviewable by a court under Section 704 of the APA. The Secretary apparently also contends that this case is not ripe for adjudication.

In support of this position the Secretary argues that there has not yet been a violation of the Jones Act. According to the Secretary, a violation occurs only when there has been a "transportation" between points within the coastwise laws—in other words, only when the goods arrive and are unloaded in a United States port. The Secretary maintains that he has no authority under the statute and regulations to detain a foreign tanker or otherwise act to enforce the Jones Act until there has been a violation as defined above. Moreover, the sole mechanism for enforcement provided under the statutes and regulations is forfeiture of the goods when the goods arrive in the United States. 46 U.S.C. § 883 (1970).

It appears that the Secretary's analysis of the statutory scheme is correct. Neither the statute nor the regulations give the Secretary or his delegates authority to prevent the Hercules or any other foreign-flag tanker carrying crude oil from Alaska to the Virgin Islands from departing Alaska, entering a port in the Virgin Islands, or entering a port in the continental United

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[6] In view of this Court's holding that plaintiff AMA has standing on behalf of its members, it is unnecessary to address plaintiff AMA's motion for class certification.

States, even if such transport were deemed a violation of the Jones Act.

In particular, the Secretary was required to issue clearance at Valdez, pursuant to 41 U.S.C. § 91 and 19 C.F.R. § 4.84, if the master of the vessel presented to the collector a manifest in accordance with 19 C.F.R. § 4.61. Section 91 of Title 46 provides:

> The master or person having the charge or command of any vessel bound to a foreign port shall deliver to the collector of the district from which such vessel is about to depart a manifest of all the cargo on board the same, and the value thereof, by him subscribed, and shall swear to the truth thereof; whereupon the collector shall grant a clearance for such vessel. . . .

Section 4.84 provides that if, as in the instant case, the master of a foreign vessel, departing from a port in noncontiguous territory of the United States for another port in noncontiguous territory of the United States, submits a manifest in accordance with 19 C.F.R. § 4.61, then "a clearance shall be granted." Section 4.61 requires the master to verify compliance with various statutes and regulations, none of which pertain to the Jones Act. Since plaintiffs have not alleged that the requirements of the manifest were not met and these provisions do not permit a clearance to be withheld on the basis that the Jones Act may be violated, plaintiffs have no basis to challenge the issuance of the clearance.[7]

Plaintiffs similarly fail to provide statutory authority upon which the Secretary could rely to deny entry in a

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[7] The Court finds that the other provision which plaintiff cites, 46 U.S.C. § 313 (1970), is inapplicable to this case. The section applies to foreign vessels departing for districts in the United States. The Virgin Islands are not included in these districts. *See* 46 U.S.C. § 293 (1970).



port in the Virgin Islands or the United States. The sole enforcement mechanism available to the Secretary under the regulatory scheme is forfeiture pursuant to 46 U.S.C. § 883.

Under this analysis of the regulatory scheme, both ripeness and finality problems are presented. Notwithstanding the fact that the Jones Act has not yet technically been violated, the Court declines to dismiss this case on the grounds of ripeness. The Court bases its conclusion upon the standards and policy established in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). According to the *Abbott* court, the basic rationale of the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. . . ." *Id.* at 148, 87 S.Ct. at 1515. It is clear from the nature of the facts, parties, and interests involved that the instant controversy is not merely abstract. Moreover, this case withstands the two-part test set forth in *Abbott*, which requires the "evaluation of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. at 1516. The issues here involve the interpretation of a statutory provision and the effect of a recent enactment upon a prior statutory provision. The factual matters in dispute pertaining to the Hess refining process will not be different at the time the goods arrive in the United States. Finally, the Court finds that plaintiffs and defendant Hess have sufficiently demonstrated the importance to their respective interests of resolving the issues immediately.

In light of the above analysis of the enforcement scheme under the Jones Act, the Secretary's claim that no final agency action or inaction within the meaning of Section 704 of the APA has been alleged is more compelling. Indeed, plaintiffs have not clearly articulated the agency

action upon which their request for judicial review is based. Apparently, they consider the grant of the clearance by the collector to be reviewable final agency action. Particularly since the issuance of a clearance is a non-discretionary act if a manifest in compliance with the regulations is presented to the collector, the issuance of the clearance does not appear to be final agency action within the meaning of section 704. While final action may be informal action, courts have generally required that one of the following elements be present: direct and immediate impact on the regulated industries as a result of this action; reliance by the regulated parties on the action; the agency action is the final agency consideration of the matter or represents the final, crystallized agency position on the matter; a high level agency official is directly responsible for the action. *See, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149-53, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *National Automatic Laundry and Cleaning Council* v. *Shultz*, 143 U.S.App. D.C. 274, 283-287, 443 F.2d 689, 698-702 (1971). The instant agency action, the issuance of the clearance by the Customs inspector, seemingly contains none of these elements.

## MERITS

Assuming, however, that the issuance of the clearance reflects the definitive agency position on the applicability of the Jones Act to the instant transportation and thus is final agency action reviewable under the APA by this Court at this time, the Court must nevertheless deny the plaintiffs' request for relief. First, the Court concludes that the Magnuson Amendment to the Ports and Waterways Safety Act, 46 U.S.C.A. § 391a(7)(C) (Supp. 1977), does not implicitly limit the application of the Virgin Islands exemption as it applies to Alaskan oil. Second, the Court finds that continuity of transportation is broken if the merchandise is changed into a new and



different product at an intermediate exempt port, and crude oil processed at the Hess refinery is transformed into new and different products. Thus, the transportation of Alaskan crude oil on the Hercules from Valdez, Alaska to the Virgin Islands does not violate the Jones Act.

### A. *The Effect of the Magnuson Amendment on the Jones Act.*

Plaintiff-intervenor Seafarers Union contends that the 1973 Magnuson Amendment to the Ports and Waterways Safety Act, 46 U.S.C.A. § 391a(7)(C) (Supp. 1977), implicitly limits the application of the Virgin Islands exemption to the Jones Act, 46 U.S.C. § 877 (1970). The Magnuson Amendment was enacted as part of a statute that regulates various aspects of the trans-Alaska delivery system. Pub.L. 93-153. Section 391a of Title 46 generally relates to the rule and regulations to be issued by the Secretary of Transportation; the regulations were to set forth minimum standards of design, construction, alteration, and repair for the purpose of protecting the marine environment. Plaintiff Seafarers Union relies on the amendment, indicated by the underscored portion of the following quote, as evidence of the Congressional intent to limit the Virgin Islands exemption:

> (C) Rules and regulations published pursuant to subsection (7)(A) shall be effective not earlier than January 1, 1974, *with respect to foreign vessels and United States-flag vessels operating in the foreign trade*, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement,

> the Secretary shall establish an effective date not later than January 1, 1976, *with respect to foreign vessels and United States-flag vessels operating in the foreign trade*, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate. *Rules and regulations published pursuant to subsection (7)(A) shall be effective not later than June 30, 1974, with respect to United States-flag vessels engaged in the coastwise trade.*

46 U.S.C.A. § 391a(7)(C) (Supp. 1970). Plaintiffs argue that the legislative history conclusively demonstrates that Congress required the completion of safety, environmental, and construction standards on United States-flag vessels at an earlier date in order to provide the greatest possible environmental protection for the marine leg of the trans-Alaska delivery system. Plaintiffs claim that the text of the amendment and the legislative history reveal that Congress intended and presumed that Alaskan oil could only be transported to the United States in American-flag vessels.

In support of this position, plaintiffs have presented numerous passages from the Congressional Record evidencing, at the very least, the belief of several legislators that the imposition of stricter standards on American ships would affect the marine leg of the Alaskan oil delivery system. Typical of the passages cited are the remarks by Senator Magnuson, who introduced the amendment:

> The amendment would simply require the Coast Guard to implement the mandate of Public Law 92-340 at an earlier date for vessels in the domestic trade and, of course, for vessels in the Alaska trade.
>
> I feel this amendment is basic to the safety of the marine leg of the Alaska system.

119 Cong.Rec. 22,837 (1973). It is fair to infer from the remarks of these legislators that at least some believed that Alaskan oil *en route* to any point within the United States, including a port in the Virgin Islands, would be required to be transported in American-flag tankers.



Notwithstanding this inference, there is no basis for plaintiffs' position that the Magnuson Amendment implicitly limits the Virgin Islands exemption to the Jones Act as it applies to Alaskan oil. First, the statutes as written are clear and unambiguous. Absent a patent ambiguity or conflict, the court will presume that the two provisions can be read consistently with each other. Second, the doctrine of repeal by implication is not favored in this jurisdiction, *See Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S.App.D.C. 380, 463 F.2d 783 (1971); accordingly, the Court looks with disfavor upon this contention of partial repeal by implication. Third, the fact that it appears from the legislative history that several legislators believed that only American-flag ships were permitted to transport Alaskan oil from Alaska to the Virgin Islands is insufficient. The Congressional intent to amend the Virgin Islands exemption must also be evident. However, the Virgin Islands exemption to the Jones Act was not even mentioned. As the Court of Appeals for this Circuit noted:

> [W]hether a statute is repealed by a later one, on the ground of repugnancy or substitution, is a question of legislative intent and . . . where powers or directions under several acts are such as may well exist together, an implication of repeal cannot be allowed. The intent of the legislature to repeal must be clear and manifest.

*Ritholz* v. *March*, 70 App.D.C. 283, 285, 105 F.2d 937, 939 (1939). Finally, if Congress truly intended to require only American-flag vessels to transport Alaskan oil to the Virgin Islands, it would have legislated to that effect.

B. *Jones Act Violation.*

Plaintiffs premise their claim that the transportation of crude oil on the Liberian-flag Hercules from Valdez, Alaska to the Virgin Islands, where the oil will be refined and the refined products transported to the United States by a foreign-flag vessel, violates the Jones Act on two theories. Plaintiffs' first argument is that continuity of transportation within the meaning of the Jones Act is based upon the shipper's intent at the time of initial departure as to the ultimate destination. They contend that even if the goods shipped are substantially changed at the intermediate point, continuity of transportation is established where the shipper, at the beginning of the voyage, clearly evidences his intent ultimately to return the goods to a point within the United States. Plaintiffs' second argument is that even if the Court finds that a substantial change in the goods at the intermediate point destroys the continuity of transportation and renders the Jones Act inapplicable, the Jones Act still applies in the instant case. They contend that the Hess refining process does not cause a substantial enough change in the nature of the merchandise to qualify it for an exemption from the Jones Act.

This case presents an issue of first impression. Indeed, neither case law nor administrative precedent addresses this issue in a similar factual context.

1. *Continuity of Transport.*

The Court must first ascertain the proper standard for the determination of continuity of transportation under the Jones Act. Plaintiffs maintain that whether a voyage is considered terminated for purposes of the Jones Act is based on the shipper's intent at the time of departure as to the ultimate destination of the merchandise. According to this view, the voyage terminates at the point of ultimate destination. They argue that



intent rather than stoppage or interruption is controlling where intent is clearly manifested. Such factors as the processing of the goods at the intermediate point are only relevant when intent is unclear; only then may processing be used as one of the indicia from which to infer intent.

Plaintiffs rely upon two opinions of the Attorney General that involve the Jones Act to support this position. In one case, the shipment of fish from Alaska to Vancouver, where they were stored for periods between four months and a year, and then to the United States was considered a "continuous" voyage subject to the Jones Act. The Attorney General noted:

> A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene.
>
> * * * *
>
> [E]ven the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there is an honest intention to bring them into the common stock of the country.

32 A.G. 350, 352 (1920), *citing The Bermuda*, 70 U.S. (3 Wall) 514, 18 L.Ed. 200 (1865).

However, the opinions of the Attorney General do not adequately support plaintiff's view. In both cases, the goods did not undergo substantial change at the intermediate port. Thus, at most, these cases provide authority for the position that intent is controlling where the goods were merely transshipped at the intermediate port.

Plaintiff AMA suggests a second argument in support of its theory that intent is determinative of the issue of continuity of transit: It urges the Court to adopt the standard for determination of continuity of transport

employed in the regulation of interstate commerce. *See, e.g., Board of Trade* v. *Olsen*, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 (1922). In these cases, intent is the prevailing standard. Plaintiff asserts that the commerce clause precedent is consistent with the purposes and manner in which Congress intended the Jones Act to be implemented.

The Court, however, finds plaintiffs' argument unpersuasive and adopts the position advanced by the defendants. Defendants contend that intention is a necessary element only when the *same* merchandise is shipped between points in the United States *via* an intermediate port. Intent is irrelevant if the merchandise is substantially changed at the intermediate port. Defendants claim that if the product is substantially changed, then the "merchandise" in the first shipment, from the point of departure to the intermediate port, is different from that in the second shipment, from the intermediate point to the point of ultimate destination. Thus, for purposes of the Jones Act, the shipment terminates at the intermediate port.

Defendants rely on the rulings and interpretations of the Customs Service and its predecessor agency. One of the Customs Service rulings, Treasury Decision 56272(2) (1964), involved partially-milled rice that was transported by a foreign vessel from California to the Virgin Islands, where it was brushed, screened, coated, polished, and fortified, and then transported by foreign ship to Puerto Rico. The continuity of transport was deemed to have been broken at the intermediate port. In another ruling, oil was transported from the United States Gulf Coast to Aruba, where it was blended with oil of foreign origin to produce low-sulphur fuel oil. The transportation was deemed to terminate in Aruba. Treasury Decision 66-244(1) (1966). Thus, in both of these cases, where the product underwent change at the intermediate



point of shipment, the Jones Act was deemed not to apply.

In 1969, in response to a request by plaintiff Shipbuilders Council for a ruling on the facts presented by the instant case, the Commissioner of Customs issued the following letter:

> In a number of cases involving the transportation of merchandise between coastwise points by way of an intermediate foreign port at which the merchandise underwent some form of processing, the Bureau has held that if the main purpose of the transportation was to have the merchandise thus processed and if the processing was not merely incidental to an intended transportation between American ports, the processing will be deemed to have broken the continuity of the transportation so that the return of the processed merchandise to the U.S. would not violate section 883, Title 46, U.S.C. Code, although all or part of the transportation was by foreign vessel. Ordinarily, we consider that processing was substantial if it changed the merchandise physically, improved its condition and advanced it in value, so that after processing, it was a new and different product; and that the fact that the foreign processing was substantial tended to establish that having it done was the main object of the exportation rather than merely incidental to an intended transportation between coastwise points.
>
> We are inclined to say at this time and on the basis of the bare facts outlined by you that the transportation would not be prohibited under the coastwise law.

Letter to Edwin M. Hood, October 15, 1969. The Customs Service apparently has consistently maintained this view. As it stated in its recent Notice of Proposed Rulemaking:

> The Customs Service and the former Bureau of Marine Inspection and Navigation, its predecessor agency in the administration of the coastwise laws, have ruled since 1938 that if merchandise is transported from a coastwise point to a port or place not subject to the coastwise laws, such a port or place in Canada or the Virgin Islands of the United States (to which the coastwise laws expressly do not apply —Executive Order No. 9170 of May 21, 1942), where it is manufactured or processed into a new and different product which thereafter is transported to a coastwise point, either segment (or both segments) of the overall transportation may be accomplished by vessels not qualified to engage in the coastwise trade. The rationale is that the continuity of the transportation is broken at the intermediate port or place and that the new and different product resulting from the manufacturing or processing is not the same as that laden at the initial coastwise point.

42 Fed.Reg. 46068 (1977). Accordingly, the Customs Service proposed the following rule:

> [m]erchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is, at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.

42 Fed.Reg. 16,068 (1977).

Upon full consideration of the arguments of all the parties and the pertinent authorities, the Court concludes that the agency interpretation is both reasonable and consistent with the statutory scheme of the Jones Act. Particularly in light of the Customs Service's long-standing interpretation and the principle that a statutory in-



terpretation by an agency responsible for the administration of the statute is entitled to great weight, *see Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), the Court adopts the interpretation of the Customs Service that continuity of transport is broken when the merchandise is manufactured or processed into a new and different product.

2. *Substantiality of the Change.*

The Court will now discuss the extent of the change in the crude oil that results from the refining process. Next, it will determine whether such change is substantial enough to constitute a new and different product, thus exempting the transportation of the crude oil from the Jones Act.

The Hess refinery in the Virgin Islands, which represents a total capital investment of approximately $650,000,000 presently has a design capacity of approximately 700,000 barrels of crude oil per day and has docking facilities to receive crude oil transported by tankers. The Hess refinery includes crude oil and product storage tank facilities, six crude oil distillation units, catalytic platforming units, one jet fuel catalytic desulphurization unit, a kerosene catalytic desulphurization unit, No. 2 oil catalytic desulphurization units, vacuum distillation units, catalytic vacuum gas oil desulphurization units, sulphur recovery units, aromatic recovery units producing benzene, toluene and mixed xylenes and a paraxylene petrochemical unit.

Crude oil, upon arrival at the Hess refinery, is stored in floating-roof crude oil storage tanks. It is then transferred to a crude distillation unit, where it is heated by heat exchangers and direct-fired heaters to temperatures ranging from 500 to 650 degrees F. It then enters the crude distillation or fractionating tower, where seven unfinished products are separated out according to their

boiling points. These products include fuel gas, light straight run, heavy naphtha, kerosene, No. 2 oil, heavy atmospheric gas oil, and unfinished residual fuel. After further distillation and other changes,[8] these unfinished products are transformed into finished products that meet industry specifications. The finished products include gasoline, jet fuel, distillates, various low sulphur residual fuel oils, and basic petrochemical products consisting of benzene, toluene, mixed xylenes and paraxylenes.

Alaskan oil that is refined at the Hess refinery will yield the following products in the following amounts:

| Product | % Volume | |
|---|---|---|
| benzene | .47 | |
| toluene | 2.23 | |
| xylene | 0.27 | |
| paraxylene | 1.08 | |
| regular gasoline | 4.19 | |
| premium gasoline | 4.19 | |
| unleaded gasoline | 3.00 | |
| jet fuel | 8.70 | |
| No. 2 Oil | 14.50 | |
| No. 6 Oil | 55.82 | |
| sulfur pellets | 0.30 | |
| | 94.75 | total marketable product recovery |
| | 5.25 | fuel gas equivalent[9] |

[8] For example, naptha is charged to catalytic platforming units, where the naphtha molecules undergo a molecular change: Naphthene molecules are converted to aromatic molecules. Unfinished jet fuel, kerosene, No. 2 oil, and residual fuel oil are desulphurized. Pitch is blended with desulphurized vacuum gas oil (separated from unfinished residual fuel oil through a vacuum distillation process) to produce No. 6 oil. Pure elemental sulphur is produced from the hydrogen sulphide gas removed from the various products.

[9] *See* Defendant Hess' Exhibit No. 2.



Benzene, toluene, xylene and paraxylene are petrochemicals used in the manufacture of finished chemical products. Jet fuel is used as fuel for jet aircraft, and gasoline as fuel for motor vehicles. Sulphur is used in the manufacture of fertilizers and pharmaceuticals. No. 2 oil is used as home heating oil. No. 6 oil is used as fuel by power plants.[10] Each of these products is different in name, physical and chemical character, and use from each other and from crude oil. Moreover, crude oil cannot be used for any of these purposes.

Notwithstanding plaintiffs' protestations to the contrary, all the credible evidence of record conclusively demonstrates that the products of the Hess refinery are new and different merchandise from the Alaskan crude oil. Clearly, the change involved in the instant case is more substantial than that involved in the two Customs Service Rulings discussed above, where the Customs Service determined that there existed a substantial enough change in the product to preclude a finding that the Jones Act applied. The Court finds further support for its position in *Shell Oil Co. of Canada, Ltd.* v. *United States*, 27 C.C.P.A. 94 (1939), where the nature of the change resulting from oil refining was examined in a different context. In that case, the Court of Customs and Patent Appeals determined that refined products are different "merchandise" from crude oil for purposes of the Revenue Act of 1932.

[10] Despite plaintiffs' contention that crude oil and No. 6 fuel oil are interchangeable for many purposes, the Court finds that the No. 6 oil produced by Hess is also different in name, characteristic, and use from crude oil for the following reasons: (a) crude oil generally has a "flash point" of room temperature or less, whereas No. 6 oil has a "flash point" of at least 150 degrees F.; (b) the No. 6 oil produced by Hess is lower in sulphur content than the Alaskan crude oil; (c) No. 6 oil has a higher BTU content per barrel than does crude oil, and (d) No. 6 oil is used as fuel by power plants and industrial facilities, whereas Hess has never sold crude oil for use as a fuel.

Thus, the Court concludes that continuity of transportation within the meaning of the Jones Act is broken if the merchandise is substantially changed into new and different products at the intermediate port. Crude oil is changed into new and different products through processing at the Hess refinery. Thus, the transportation of crude oil by the Hercules or any foreign-flag tankers from Valdez, Alaska to the Virgin Islands, where the oil is refined and thereafter the products are shipped to the United States mainland, is not a violation of the Jones Act. Preliminary and permanent injunctions are denied and the case is dismissed.



## APPENDIX D

## STATUTES AND REGULATION INVOLVED

*STATUTES*

Section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 883, provides in pertinent part:

> § 883. Transportation of merchandise between points in United States in other than domestic-built or rebuilt and documented vessels
>
> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: * * *.

Section 21 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 877, provides:

> § 877. Coastwise laws extended to island Territories and possessions
>
> From and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States not covered thereby on June 5, 1920, and the Secretary of Commerce is directed prior to the expiration of such year to have established adequate steamship service at reasonable rates to accommodate the commerce and the passenger travel of said islands and

to maintain and operate such service until it can be taken over and operated and maintained upon satisfactory terms by private capital and enterprise: Provided, That if adequate shipping service is not established by February 1, 1922, the President shall extend the period herein allowed for the establishment of such service in the case of any island Territory or possession for such time as may be necessary for the establishment of adequate shipping facilities therefor: And provided further, That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same.



## APPENDIX E

1976 U.S. Exports Returned in Imports to the U.S. by Vessel for Selected Articles

| Exported article | Quantity of U.S. exports by vessel (tons) | Quantity of returned U.S. goods in foreign imports by vessel (tons) | Ratio of returned goods to exports (percent) |
|---|---|---|---|
| Raw cotton returned in textiles from the Far East [a] | 615,636 | 22,821 | 3.7 |
| Electronic components returned in television and radio sets [b] | 51,458 | 3,136 | 6.1 |
| Iron ore returned in steel from Japan [c] | 0 | 0 | 0 |
| Iron and steel scrap returned in steel from Japan [d] | 1,300,000 | 70,000 | 5.4 |
| Raw hides returned in tanned hides [e] | 486,378 | 378 | 0.1 |

[a] Exports of raw cotton and imports of textiles from U.S. trade sources. In estimating the return of U.S. cotton in imported textile products, U.S. content is assumed proportional to the U.S. share of the total input materials used to produce the textile output. Input materials include raw cotton and yarn, and textile products include the Bureau of Census, Schedule A commodity group 65—textile yarn, fabrics, made-up articles and related products—in which cotton is the chief constituent.

[b] Weight of U.S. electronic components from U.S. trade sources. Weight of U.S. electronic components in foreign imports of television and radio sets was determined as follows: (1) weight of sets imported by vessel from U.S. trade sources; (2) the dollar value of U.S. components as a percentage of the value of total imported sets derived from U.S. trade sources; (3) total weight of U.S. components was then obtained by multiplying the percentage U.S. to total value by the weight of imported sets. Categories included under exports are: receiving tubes, cathode ray tubes, transmitting industrial and special purpose tubes, semiconductors, electronic capacitors, resistors for electronic applications, electronic coils, transformers and other inductors, connectors for electronic applications, and other electronic components. Categories of imports are: radio receivers, television receivers, radio-phonograph combinations, radio-tape player combinations, radio-phono-tape player combinations, radio-tape recorder combinations, radio-phono-tape recorder combinations, and radio-tv-phono combinations.

[c] There is no circular trade in iron ore and steel products between the U.S. and Japan, because Japan imports no iron ore from the U.S.

[d] U.S. exports of scrap to Japan from U.S. Bureau of Mines sources. Japanese exports of steel to the U.S. from Japan Iron and Steel Monthly Report—Iron and Steel Statistics, March 1976 and February 1977. The amount of U.S. scrap in Japanese steel per ton is 0.9 percent, since scrap represents about 35 percent of the total volume of steel produced in Japan and the U.S. provided 2.6 percent of such scrap in 1976. Thus of 8.2 million tons of steel imported from Japan in 1976, around 70,000 tons may be considered reprocessed U.S. scrap.

[e] Exports of raw hides are included for major U.S. markets only, which account for over 80 percent of the total exports. Exports of raw hides from U.S. trade sources. Imports of tanned hides from U.S. trade sources. Included under hides are raw cattle, calf, and sheep hides. Unlike the other articles in the table, the U.S. share of total raw hides supplied to the producing countries was not employed in this analysis. This overstates the ratio, already extremely low (0.1 percent).



Sources: U.S. Department of Commerce, Bureau of the Census, *U.S. Exports, Schedule B, Commodity By Country*, FT 410, December 1976; U.S. Department of Commerce, Bureau of the Census, *U.S. General Imports, Schedule A, Commodity By Country*, FT 135, December 1976; U.S. Department of Commerce, Bureau of the Census, *U.S. Imports For Consumption, TSUSA Commodity By Country of Origin*, FT 246, Annual 1976; U.S. Department of Commerce, Bureau of the Census, *U.S. General Imports, World Area by Commodity Groupings*, FT 155, Annual 1976; U.S. Department of Commerce, Bureau of the Census, *U.S. Imports for Consumption and General Imports, TSUSA Schedule*, IA 245, 1976; U.S. Department of Commerce, Bureau of the Census, *U.S. Imports of Merchandise for Consumption and General Imports of Merchandise*, IA 245-A, 1976; U.S. Department of Commerce, Bureau of the Census, *U.S. Exports, Schedule B Section*, EA 622, 1976; U.S. Department of Commerce, Bureau of the Census, *U.S. Exports*, FT 455, 1976; U.S. Department of Agriculture, Foreign Agricultural Service, *Foreign Agriculture Circular, Cotton*, FC 1-78, Tables 33, 40, 43, 46, 47, 51, and 54.

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

No. 78-1287

AMERICAN MARITIME ASSOCIATION,
*Petitioner,*

v.

MICHAEL BLUMENTHAL AND AMERADA HESS CORPORATION.

## BRIEF OF SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF THE PETITION OF AMERICAN MARITIME ASSOCIATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF OF SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF THE PETITION OF AMERICAN MARITIME ASSOCIATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Shipbuilders Council of America respectfully offers this brief in support of the petition of the American Maritime Association for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this action.

## OPINIONS BELOW

The opinion of the court of appeals is not yet reported, but is reprinted in full in Appendix A to the Petition of the American Maritime Association at pages 1a-33a. The opinion

of the district court is reported at 458 F. Supp. 849 (D.D.C. 1977) and is reprinted in full in Appendix C to the Petition of the American Maritime Association at pages 36a-62a.

## JURISDICTION

The judgment of the court of appeals (Petition of American Maritime Association, App. B, pages 34a-35a) was entered November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The Shipbuilders Council of America adopts the statement of questions presented, statement of statutes involved, and statement of the case, set forth in the "Petition of the American Maritime Association."

## REASONS FOR GRANTING THE WRIT

The Shipbuilders Council of America concurs in the reasons presented by the American Maritime Association for granting its petition for a writ of certiorari. The Shipbuilders Council respectfully submits the following additional reasons for granting the writ.

This is a case of first impression of substantial importance to the integrity of Section 27 of the Merchant Marine Act of 1920 ("the Jones Act"), 41 Stat. 999, 46 U.S.C. §883, and to the health of United States maritime industries. The decision of the Court below creates a gaping loophole in the Jones Act and may in fact emasculate it. The decision is contrary to the express purposes of the Jones Act and threatens significant injury to the shipbuilding industry. The Court below has decided an important federal question not previously decided by this Court but which this Court should resolve.



### The Ruling of the Court Below Undermines the Jones Act

The Jones Act forbids the waterborne transportation on a foreign vessel of merchandise taken between U.S. ports via a foreign port. It contains no exception for processing at a foreign port. However, such an exception has been engrafted onto the Act by the United States Customs Service—the agency charged with its enforcement—through occasional informal interpretive rulings. Subsequent to the initiation of this action in the district court the Customs Service proposed to codify this exception as follows:

> [m]erchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is, at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point. 42 Fed. Reg. 46068 (Sept. 14, 1977).

The American Maritime Association and the Shipbuilders Council of America have maintained that this exemption is too broad because it completely ignores the intent of the shipper. We urged below that if processing at an intermediate foreign port is merely incidental to a plan to transport merchandise in the coastwise trade, such processing should not exempt the transportation from the Jones Act. The court below, however, concluded that the interpretation of the Customs was reasonable and consistent with the statutory scheme of the Merchant Marine Act of 1920 and deferred to the Customs Service's interpretation. However, we submit that the relevant Customs Service rulings have not been of the nature, consistency, or frequency to justify judicial deference. The Customs Service has *not* been consistent over the years as to whether the intent of the shipper is relevant in determining the applicability of the Jones Act.

More importantly, the recently proposed Customs Service rule, unlike many contrary previous Customs Service rulings, opens an expansive loophole in the Jones Act which undermines its ability to preserve the viability of the American merchant marine. The new test, sanctioned by the court below, relies solely upon a semantic analysis of whether the merchandise which arrives at one U.S. port is the "same" merchandise which left another U.S. port or a "new and different product." A logical extension of the Customs Service's "new and different product" test would allow the exemption of the transportation of products from one U.S. port to another where processing is completed *on board the transporting vessel* so long as the "same" merchandise that left one U.S. port did not arrive at the other U.S. port. As the Customs Service has recently applied this test, it takes very little processing to make merchandise into a "new and different product" and to thereby circumvent the Jones Act. Thus the Customs Service would exempt the transportation of two cargoes of residual fuel oil (of slightly different weight and sulfur content) shipped from Texas to New York if the cargoes were mixed together *en route* at a foreign port. 42 Fed. Reg. 46,068 (1977).

The history of the Merchant Marine Act of 1920 demonstrates that exceptions to the Jones Act must be read narrowly to avoid easy evasion which would undermine the Congressional purpose to develop and maintain a viable American merchant marine. Yet easy evasion will be the result of the determination of the Customs Service, sanctioned by the Court below, that mere processing of merchandise at an intermediate foreign port legitimizes the foreign-flag transportation of that merchandise between U.S. ports.

**The Ruling of the Court of Appeals Is Contrary to the Express Purposes of the Jones Act Because it Threatens Significant Injury to the Shipbuilding Industry**

The Merchant Marine Act of 1920 mandates that the agencies administering it "keep always in view" the goal of



developing and encouraging a viable U.S. merchant marine. Section 1, Merchant Marine Act of 1920, 46 U.S.C. 861. This goal will be thwarted as a result of the decision of the court below, a result acknowledged by Judge Gasch in his district court opinion:

> The testimony and papers presented to the Court strongly support the finding that if the instant transportation by foreign-flag tankers is not deemed a violation of the Jones Act, then whenever possible, foreign-flag rather than American-flag ships will be chartered for shipment of Alaskan oil to the Virgin Islands because of lower costs. Thus, a substantial amount of trade will be diverted from the American shipping industry. American ship owners and operators, shipbuilders, and seamen will lose significant business and suffer economic harm. [footnote omitted] (J.A. 18).

The extent of the damage to U.S. shipbuilding is explained in the post-trial letter of Robert J. Blackwell, Assistant Secretary of Maritime Affairs, U.S. Department of Commerce (Appendix A, 1a-3a). Mr. Blackwell explained that 15 tankers, of from 80,000 to 165,000 deadweight tons, have been contracted for in anticipation of the Alaskan oil trade under financing guaranteed by the U.S. government. Probable economic losses and possible defaults on a significant portion of the $650,000,000 of government guaranteed obligations could result if the Alaskan oil trade is not available to these vessels.

The goal of protecting the U.S. Merchant Marine has been adopted by Congress because:

> [i]t is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxillary in time of war or national emergency . . . 46 U.S.C. §861.

Thus, the precise interests which the Merchant Marine Act of 1920 was intended to protect are now seriously threatened by the niggardly view of the scope of the Act recently proposed by the Customs Service and adopted by the Court below.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition of the American Maritime Association for a writ of certiorari should be granted.

Respectfully submitted,

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## Appendix A

[DoC Seal]
UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Maritime Affairs
Washington, D.C. 20239

October 25, 1977

Joseph A. Klausner, Esq.
Suite 1009-A
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Klausner:

This letter is being sent in response to your recent inquiries concerning the unsubsidized tanker construction program and its relationship to the planning and construction of the Trans-Alaska Pipeline.

Traditionally, nonsubsidized U.S.-flag vessels have been built in U.S. shipyards for the carriage of cargoes moving in the domestic trades which are, due to the Jones Act, restricted to movement by such vessels.

At the time of the announcement of the construction of the Trans-Alaska Pipeline, virtually no unsubsidized tankers were under construction in U.S. shipyards. Since the development of the Alaskan oil market, 15 tankers, ranging from 80,000 dwt to 165,000 dwt have been contracted for without the aid of construction-differential subsidy but with financing guaranteed by the U.S. Government through the program provided for in Title XI of the Merchant Marine Act, 1936, as amended.

It is highly unlikely that these ships would have been built in the absence of the market potential offered by the trade from Alaska to the lower 48 states. Their construction would have been improbable without this market potential not only from a commercial point of view but also in terms of the ability of the

Maritime Administration to participate in the financing of their construction. In fact at the time the pipeline was initially under consideration, and until quite recently, it was contemplated that all of the North Slope oil would be used on the West Coast.

In considering approval of applications for Title XI loan guarantees, the Assistant Secretary for Maritime Affairs is required by 46 U.S.C. 1104(d) to determine that the proposed project is economically sound. In making this determination, an analysis is made of the expected employment of the vessel. In connection with the financing of each nonsubsidized tanker in recent years, the Maritime Administration has relied heavily upon the probability of profitable employment of such ships in the Alaskan oil trade. At this time Government-guaranteed obligations in excess of $650,000,000 are outstanding with respect to nonsubsidized tankers intended for use in the domestic trades of the United States.

In the event that for some reason the Alaskan trade were not to be available for these vessels, the only other logical markets would be either the coastwise movement of oil or the Strategic Petroleum Reserve Program, a program involving Government-generated shipments of oil at least 50 percent of which, in accordance with 46 U.S.C. 1241 (b) (i), are required to be shipped on privately owned U.S.-flag vessels to the extent they are available at fair and reasonable rates. The application of a limited form of cargo perference in the commercial foreign trades was recently rejected by Congress and therefore this possible opportunity for employment of nonsubsidized U.S.-flag tankers in the foreign trade is effectively foreclosed.

It is now clear that if the opportunities for employment of U.S.-flag vessels in the Alaskan trade were to be substantially reduced, overtonnaging would be created in other domestic trades and probably the Strategic Petroleum Reserve Program as well. The result of this combination of events would likely be economic losses and possible defaults by these and/or other



Title XI program vessels with the ultimate requirement that the Government either advance payments to operators in order to avoid defaults or more likely the payment by the Government to bondholders pursuant to its full faith and credit guarantee.

Sincerely,

/s/ ROBERT J. BLACKWELL
ROBERT J. BLACKWELL
*Assistant Secretary*
*for Maritime Affairs*

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Shipbuilders Council of America in Support of the Petition of American Maritime Association for Writ of Certiorari to the United States Court of Appeals for the District of Columbia was served by mail, postage prepaid, on April 17, 1979 to:

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No. 78-1287

# In the Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN MARITIME ASSOCIATION, PETITIONER

*v.*

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1287

AMERICAN MARITIME ASSOCIATION, PETITIONER

*v.*

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 590 F. 2d 1156. The opinion of the district court (Pet. App. 36a-62a) is reported at 458 F. Supp. 849.

### JURISDICTION

The judgment of the court of appeals was entered on November 20, 1978. The petition for a writ of certiorari was filed on February 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether Section 27 of the Jones Act prohibits foreign-flag vessels from transporting Alaskan crude oil from Valdez, Alaska, to St. Croix in the United States Virgin Islands for refining and processing.

## STATEMENT

Since 1977, shortly after the Trans-Alaska Pipeline System began operations, respondent Amerada Hess Corporation (Hess) has chartered foreign-flag tankers to carry crude oil from Valdez, Alaska to its refinery in St. Croix, United States Virgin Islands (Pet. App. 4a-5a). At the refinery, Hess processes the crude oil into a variety of petroleum products, including gasoline, diesel fuel, fuel for power plants, sulfur pellets and various petrochemicals (*id.* at 13a-14a). It then ships these products to ports on the United States mainland.

Petitioner and other organizations representing domestic shipping interests[1] brought this suit against Hess and the Secretary of the Treasury[2] in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief to require that Hess use American-flag ships to carry its oil from Valdez to St. Croix. Petitioner based its complaint on Section 27 of the Merchant Marine Act of 1920 (the Jones Act), 46 U.S.C. 883, which forbids, on penalty of forfeiture, any "merchandise" to be carried by water "between points in the United States, including * * * possessions thereof embraced within the coastwise laws * * *," except in American-flag ships.

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[1]See Pet. App. 37a.

[2]Permission of the Secretary of the Treasury is necessary before any foreign vessel may proceed from one point in the United States to another. 46 U.S.C. 313; Reorganization Plan No. 26 of 1950, 64 Stat. 1280. See also 19 C.F.R. 4.84. Petitioner sought to enjoin the Secretary from issuing a permit to the Hercules, a tanker of Liberian registry that was preparing to transport Hess' first load of Alaskan crude oil to St. Croix. Pet. App. 39a.



The district court denied relief and dismissed the complaint.[3] It relied on Section 21 of the Jones Act, 46 U.S.C. 877, which provides:

> [T]he coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands * * *.

No president has ever issued such a proclamation. Pet. App. 41a.

The district court held that the exemption "applies clearly to voyages that *begin* or *terminate* in the Virgin Islands" and does not apply to "shipments between points in the United States *by way of* the Virgin Islands" (Pet. App. 41a; emphasis added). The issue, then, was "whether this shipment of crude oil constitutes two discrete shipments of different merchandise and hence is exempt from the Jones Act, or whether it constitutes one continuous voyage and thus is subject to the Jones Act." *Id.* at 42a. The court adopted the Customs Service's "consistently maintained" interpretation of the Jones Act (*id.* at 57a; see also Pet. App. 16a n.38) and held that "continuity of transport is broken when the merchandise is manufactured or processed into a new and different product" (*id.* at 59a).

Applying that test to the shipment of crude oil in this case, the court concluded that "all the credible evidence of record conclusively demonstrates that the products of the Hess refinery [in the Virgin Islands] are new and different

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[3]The district court concluded that no final action had been taken sufficient to make the case ripe for judicial review (Pet. App. 47a-50a), but it assumed finality in order to reach the merits (*id.* at 50a). We question the propriety of such a procedure, because jurisdictional issues should be reached before making decisions on the merits. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 119-124 (1976).

merchandise from the Alaskan crude oil" (*id.* at 61a), and thus the Jones Act does not prohibit Hess from using foreign vessels to transport crude oil from Alaska to the Virgin Islands. *Id.* at 62a.[4]

The court of appeals affirmed (Pet. App. 1a-33a). It agreed with the district court that because the refined products are "new and different merchandise from the Alaskan crude oil" (*id.* at 14a), the shipments from Alaska to the Virgin Islands, and from the Virgin Islands to the mainland, are separate shipments and thus within the Virgin Islands exception to the American-flag requirement (*id.* at 16a, 18a-20a). It noted that statutes authorizing forfeitures are to be strictly construed (*id.* at 20a-22a). It also recognized that Congress on at least 10 occasions has refused to extend the coastwise laws to the Virgin Islands, and that the judiciary therefore should not "rush without clearest guidance from other, accountable branches of Government to erect new and formidable trade barriers" by barring foreign ships from carrying Alaskan crude oil to the Virgin Islands (*id.* at 23a-28a).[5]

**ARGUMENT**

The decision of the court of appeals is correct. Although the decision may have substantial consequences for U.S. flag shipping,[6] it does not conflict with decisions

[4]The district court also held that the plaintiffs had standing to sue (Pet. App. 42a-47a) and that the Magnuson Amendment to the Ports and Waterways Safety Act of 1972, 46 U.S.C. 391a(7)(C), did not limit the Virgin Islands exception in the Jones Act (Pet. App. 51a-53a).

[5]The court of appeals agreed with the district court (see note 4, *supra*) that the Magnuson Amendment did not restrict the carriage of Alaskan crude oil to American-flag vessels. Pet. App. 28a-33a.

[6]The Maritime Administration of the Department of Commerce believes that some of the U.S.-owned vessels operating under the Jones Act and financed under its vessel loan guarantee program (Title XI of the Merchant Marine Act of 1936, 46 U.S.C. 1271-1279) may be denied employment as a consequence of the court of appeals' decision. This creates the possibility that there will be defaults in shipowners' bond payments, which could exceed $100 million. The government would be required by its guarantees to make payments following such defaults.



of this or any other court, and petitioner presents no issue warranting this Court's review.

Petitioner does not dispute the fact that Section 21 of the Jones Act exempts the Virgin Islands from the restrictions on coastwise trade and thus allows foreign-flag vessels to carry merchandise in voyages beginning or ending in the Virgin Islands. Nor does petitioner seriously challenge the conclusions of both lower courts that, by refining Alaskan crude oil in the Virgin Islands, Hess manufactures new products from raw materials, and thus no single shipment of "merchandise" takes place between Alaska and the mainland—points subject to the coastwise laws. Rather, petitioner argues that, under the Commerce Clause, Congress has the power to regulate interstate commerce both before and after intermediate processing, or "manufacturing," of the goods involved; that is, manufacture does not interrupt the flow of commerce to such an extent that Congress is divested of its authority to regulate that flow from beginning to end (Pet. 7-11, 18-19). Petitioner points to other exercises of the commerce power (*e.g.*, the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1 *et seq.*) to show that Congress has exercised this authority to the fullest in other contexts, and suggests (Pet. 7) that the court of appeals was mistaken in concluding that Congress did not exercise it fully here.

Petitioner's argument that Congress has plenary authority to regulate the "flow" of commerce is beside the point. No one disputes that Congress could, if it wished, extend the American-flag requirement to the shipments involved here. It could, in the exercise of its commerce

power, amend the Jones Act to provide that an intermediate manufacturing or refining process in the Virgin Islands or elsewhere does not result in new "merchandise" on the voyage from the point of manufacture to the mainland. Similarly, a presidential proclamation could achieve the same effect. But the court of appeals recognized this authority and recognized also that Congress and the President have chosen not to exercise it here:

> Though manufacture or processing of a product may to too "incidental" to interrupt the flow of commerce generally, such alteration in the nature of the goods may yet be substantial enough to exempt those goods from the intended reach of a particular statute.

Pet. App. 22a n.54; see Pet. 6.

The fact that Congress has exercised its authority to establish particular rules for commerce in other contexts (see Pet. 7) does not show that Congress adopted the particular rule for which petitioner contends. The court of appeals did not view in isolation Section 27's restrictions on the "transport[ ]" of "merchandise" in foreign vessels. It also considered, as it was bound to do, Section 21 of the same Act, in which Congress provided that, unless the President declares otherwise, voyages to or from the Virgin Islands are not subject to the restrictions that Section 27 imposes on coastwise trade. Congress has consistently refused to delete the Virgin Islands exemption despite petitioner's repeated requests that it do so in order to oust foreign vessels from the Alaska-Virgin Islands-mainland traffic in crude oil and refined petroleum products (see Pet. App. 24a-25a). Had Section 21 never been enacted, there might be room for petitioner to argue that Section 27 extends to every aspect of interstate commerce. But Section 21 forecloses any such argument.



The court of appeals here simply recognized that Congress and the President have declined to give petitioner the relief it seeks.[7]

Petitioner fares no better in its attack on the principle that forfeiture statutes are to be strictly construed (Pet. 16-17). The court of appeals' decision did not turn on the construction of forfeiture statutes; the court simply referred to the principle of strict construction to reinforce the conclusion that Congress did not intend the shipments at issue here to be subject to the restrictions on coastwise trade (Pet. App. 20a-22a & n.54).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

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[7]For this reason, petitioner's contention (Pet. 15-16) that the Virgin Islands exemption has outlived its usefulness and "give[s] adventitious benefits primarily to non-Virgin Islands interests" is irrelevant, as is its contention (Pet. 17-19) that the loss of trade to foreign vessels is substantial. These are arguments for Congress or the President, not for this Court.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1287

AMERICAN MARITIME ASSOCIATION,
*Petitioner,*

v.

MICHAEL BLUMENTHAL and
AMERADA HESS CORPORATION,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENT AMERADA HESS CORPORATION

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IN THE

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF IN OPPOSITION FOR RESPONDENT AMERADA HESS CORPORATION

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### QUESTION PRESENTED

Section 27 of the Merchant Marine Act, 1920, 46 U.S.C. § 883, known as the "Jones Act," provides for forfeiture of "merchandise . . . transported . . . between points in the United States . . . embraced within the coastwise laws, either directly or via a foreign port," by foreign-flag vessels. The U.S. Virgin Islands are expressly excluded from the coastwise laws by Section 21 of the Act, 46 U.S.C. § 877. The question presented is whether the Jones Act applies to the transportation of

crude oil from Alaska to the Virgin Islands for refining and the subsequent transportation of the resulting products from the Virgin Islands to the U.S. mainland.

## STATEMENT

Petitioner, an association of operators of U.S.-flag vessels, filed suit in the district court seeking injunctive relief directing the Secretary of the Treasury to prevent the foreign-flag tank vessel HERCULES from transporting a cargo of crude oil from Alaska to St. Croix, Virgin Islands, and also a declaratory judgment that such transportation violates the Jones Act. Respondent Amerada Hess Corporation, whose subsidiaries were the charterer of the HERCULES, owner of her cargo and owner of a St. Croix refinery to which the crude oil was being transported, intervened as a defendant.[1]

Recognizing that the Alaskan crude oil was being shipped to the Virgin Islands and that the Virgin Islands were expressly excluded from the coastwise laws, petitioner contended that the Jones Act was nevertheless applicable on the theory that "petroleum" was being transported from Alaska to the U.S. mainland via the Virgin Islands. It argued that manufacture of the crude into various new and different products in the Virgin Islands is immaterial if the shipper intends from the outset to transport the products to a point within the United States.

The Customs Service (a unit within the Treasury Department) and its predecessors, the agencies responsible for the administration of the Jones Act, have consistently taken the position that the statute does not apply to facts such as those present here. This construction has been affirmed in a long-standing series of administrative in-

[1] An association of domestic shipbuilders and a labor union intervened as plaintiffs and participated in both the trial and appellate proceedings, but have not sought review by this Court.



terpretations to the effect that the statute does not apply to the transportation of merchandise manufactured or processed into new and different merchandise at an intermediate non-coastwise point.[2] The construction was reaffirmed by the Customs Service on the present facts in 1969 (Pet. 7a-8a) and again in 1977, prior to the commencement of the trial below, when it published proposed interpretive regulations (42 Fed. Reg. 46068) stating (Pet. 8a-9a):

> [M]erchandise is not transported coastwise if at an intermediate point or place other than a coastwise point (that is, at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.

Following trial the district court concluded (Pet. 37a-62a) that the transportation involved did not violate the Jones Act, denied the requested relief and dismissed the case. The court of appeals affirmed by unanimous opinion, treating comprehensively each argument made by petitioner (Pet. 3a-33a). Both courts held the above-quoted Customs Service statement to be a correct interpretation of the statute and found from the evidence that the Virgin Islands refining process changed the crude oil into eleven new products, each of which was chemi-

[2] These interpretations, consisting of letter rulings of the Customs Service and its predecessors, are collected in the appendix to respondent Blumenthal's brief in the court below. Typical among them are rulings holding the Jones Act inapplicable to rice shipped from California to the Virgin Islands for milling and packaging, thence to Puerto Rico (a coastwise point) (January 15, 1963); unbleached cotton shipped from the United States to a foreign country for bleaching, then returned to the United States (November 9, 1961); oil shipped from the U.S. Gulf to Aruba for blending with foreign oil to produce low sulphur oil then returned to the United States (November 22, 1968).

cally and physically different from crude oil and used for purposes for which crude oil cannot be used (Pet. 14a-15a).

Petitioner's statement (Pet. 3) improperly asserts various facts allegedly occurring subsequent to the trial below, all relating to the volume of Alaskan crude being transported to the Virgin Islands. These facts are both outside the record and incorrect.

## REASONS FOR DENYING THE WRIT

The only basis asserted by petitioner for granting the writ is the alleged importance of the question presented. But the Jones Act has been on the books since 1817 in essentially its present form, except for the clause "directly or via a foreign port" added in 1893. Yet only once, in *United States* v. *250 Kegs of Nails*, 61 F. 410 (9th Cir. 1894), has a question even similar to the present one come before any court.[3]

Moreover, all that turns on the question presented is simply whether the oil in question (involving but a single refinery) moves in unsubsidized U.S.-flag tankers, many of which are operated by petitioner's members, or on foreign-flag or subsidized U.S.-flag tankers. While this may well be important to the private parties, it is hardly a matter of such public importance to warrant this Court's review. *Rice* v. *Sioux City Cemetary*, 349 U.S. 70, 79 (1954); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1925). And even as to the interests of petitioner's members, it is clear that economic decisions could not have been made by them on

[3] *250 Kegs of Nails* held that a pause of unchanged American merchandise in a foreign port before transshipment to the United States was sufficient to render the Jones Act inapplicable. Unlike the present case, the merchandise was in no manner altered and the case prompted the "via a foreign port" amendment referred to above.



the assumption that the Jones Act would be held applicable to the facts of this case, for, as the record shows, they knew at least as early as 1969 that the Customs Service disagreed with them on precisely these facts (see Pet. 7a-8a). In the intervening ten years they have, as many times, unsuccessfully sought to persuade Congress to amend the law to make it applicable to the present facts (Pet. 25a). Nor has the President by proclamation extended the Jones Act to the Virgin Islands as he is free to do even under the existing law (46 U.S.C. § 877).

Both courts below found significant the 1969 Customs Service interpretation, as well as its 1977 proposed interpretive regulation quoted above, that the Jones Act does not apply to the present facts, and also the fact that these recent interpretations were in accord with the long series of administrative interpretations to the same effect referred to at note 2, *supra* (Pet. 16a, note 38, and 56a-59a).

In arguing that the lower courts and administrative agency all have incorrectly interpreted the Jones Act, petitioner is reduced to claiming that their construction is inconsistent with this Court's interpretation of various statutes regulating interstate commerce. Petitioner's argument rests on cases involving either Congress' constitutional power to regulate broad segments of domestic commerce, *e.g. Swift & Co.* v. *United States*, 196 U.S. 375 (1905), or the scope of federal jurisdiction over a particular aspect of commerce, *e.g.*, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911). Petitioner argues (Pet. 7) that such decisions have found the term "interstate trade or commerce" sufficient to show a congressional intention to reach "the whole flow" of commerce, notwithstanding intermediate pauses for manufacture, and must be read as showing the same congressional intention with respect to the Jones Act.

It should suffice to say that the present case is not concerned with the subjects addressed in the commerce clause cases relied upon by petitioner. Unlike the various broad remedial enactments involved in the cases cited by petitioner, the Jones Act does not purport to apply its objectives to a broad segment or "flow" of interstate trade or commerce.[4] The Jones Act is a promotional statute protecting a particular segment of U.S. industry from foreign competition in a narrowly-circumscribed area—the transportation of merchandise between points in the United States embraced by the coastwise laws. This narrow protectionist statute expressly states that the coastwise laws do not extend to the Virgin Islands.[5] Whether something is within the flow of interstate commerce simply has nothing to do with whether it involves transportation covered by the coastwise laws. The lower court correctly found the decisions cited by petitioner inapposite to the interpretation of this particular statute which was enacted "for a very specific purpose, with sharply defined contours" (Pet. 21a).

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[4] The court of appeals answered petitioner's argument economically and effectively in footnote 54 of its opinion where it stated (Pet. 22a):

> The fact that an interruption to the flow of goods in interstate commerce does not oust federal regulatory power does not suggest that Congress intended that all regulatory statutes it enacts in the commercial area be applied to every imaginable perambulation of commercial goods. Though manufacture or processing of a product may be too "incidental" to interrupt the flow of commerce generally, such alteration in the nature of the goods may yet be substantial enough to exempt those goods from the intended reach of a particular statute . . . .

[5] Since the statute unequivocally states that the coastwise laws do not extend to the Virgin Islands, it is unnecessary to interpret the Virgin Islands exemption or to address petitioner's argument (Pet. 15) that the lower court erroneously construed it. While the "strict construction" doctrine applicable to forfeiture statutes has vitality for the reasons stated in the lower court's opinion (Pet. 20a-21a), the same construction should be reached wholly apart from that doctrine, particularly in light of the long-standing consistent administrative construction of the law.



## CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF OF PETITIONER AMERICAN MARITIME ASSOCIATION

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## REPLY BRIEF OF PETITIONER AMERICAN MARITIME ASSOCIATION

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Citing the figures and views of the Department of Commerce, the Solicitor General concedes the importance of this case.[1] The question then is whether it presents "an issue warranting this Court's review" (Opp., p. 5).

[1] He cites the potential liability of the Department as being in excess of $100,000,000. A communication of the Assistant Secretary of Commerce for Maritime Affairs (attached to the brief *amicus curiae* of the Shipbuilders Council) sets the figure at $650,000,000. The amount at risk for the domestic tanker industry as a whole is approximately $1.5 billion.

1. In his opposition, the Solicitor General correctly and fairly states AMA's position: that in § 27 of the Merchant Marine Act of 1920, 46 U.S.C. 883, as in the Interstate Commerce Act, the Congress "has exercised its authority to the fullest," so as to regulate the "flow of commerce * * * from beginning [in Alaska] to end [on the U.S. mainland]" (*Ibid.*). However, the Solicitor General urges that petitioner's argument is undercut by the enactment of § 21 of the Merchant Marine Act of 1920, 46 U.S.C. 877, which extended the coastwise laws to the territories but exempted the Virgin Islands. He admits that, "[h]ad Section 21 never been enacted, there might be room for petitioner to argue that Section 27 extends to every aspect of interstate commerce," but argues that "Section 21 forecloses any such argument" (Opp., p. 6).

By this formulation, the Solicitor General concedes that, had the refining been done in the *British* Virgin Islands, for example, § 27 would arguably apply to the entire movement, because § 21, exempting the *U.S.* Virgin Islands, in no way limits the extension of § 27 to that "aspect of interstate commerce." In this respect the Solicitor General departs from the opinion below and as well from the Treasury's view.[2]

If then there is "room * * * to argue" that § 27 encompasses a movement between coastwise points by way of an intermediate foreign port of manufacture, *a fortiori* there is an important and unresolved question whether it encompasses a movement between coastwise points which includes manufacture in a territory of the

[2] The Customs Service proposed regulations, which would exempt from § 27 coastwise movement where there is manufacture "at an intermediate port or place other than a coastwise point," defines "intermediate port or place" indifferently as either "a foreign port or place, or * * * a port or place in a territory or possession of the United States not subject to the coastwise laws." 42 F.R. 46068 (September 14, 1977); see Pet. App. A, pp. 8a-9a.



United States which for exogenous reasons was exempted from the coastwise laws.

That Congress in enacting § 21 did not intend to place the Virgin Islands on a more exalted level than foreign ports is shown by its legislative history: "Your committee, however, has no intention of weakening in any way the coastwise laws of the United States * * *." H. Rep. 2281, 74th Cong. 2nd Sess. 2 (1936).

2. The government attempts to imbue the § 21 proviso with special significance by arguing that:

> Congress has consistently refused to delete the Virgin Islands exemption despite petitioner's repeated requests that it do so in order to oust foreign vessels from the Alaska-Virgin Islands-mainland traffic in crude oil and refined petroleum products. [Opp., p.6]

Apart from the fact that the introduction of amendatory bills not acted upon by the Congress is no guide to the construction of an earlier statute (*Girouard* v. *United States*, 328 U.S. 61, 69 (1946)), the Solicitor General's contention is simply factually in error. While these bills did propose to extend the coastwise laws to the Virgin Islands with respect to the transportation of petroleum products, they were not addressed to the "Alaska-Virgin Islands-mainland traffic," if for no other reason than because that traffic did not exist. Those bills addressed the competitive advantage that respondent Hess secured over Gulf Coast refiners by being able to move a product refined from Middle East crude oil from the Virgin Islands to the East Coast on foreign bottoms, while the Gulf Coast refiner had to use U.S. flag vessels.[3] Since the oil

[3] See the testimony of Senator Bennett Johnston of Louisiana (the sponsor of S.2422, 94th Cong. 1st Sess. 1975) at Hearings on S.2422 before the Subcommittee on Merchant Marine of the Committee on Commerce, U.S. Senate, 94th Cong. 2d Sess. February 25, 1976, p. 6.

refined was foreign, there was no issue of continuous flow between coastwise points; the traffic fell squarely within § 21's exemption. Thus while those bills might be evidence that § 21 excludes from § 27 a voyage beginning at the Virgin Islands and ending at the mainland (a point not in dispute), they tell absolutely nothing about the applicability of § 27 to a continuous movement between coastwise points where there is manufacture at an intermediate point not subject to the coastwise laws.

3. We are left then with the lower court's Delphic formulation that, while manufacture or processing does not "interrupt the flow of commerce generally, such alteration * * * may yet be substantial enough to exempt those goods from the intended reach of a particular statute" (Opp., p. 6; Pet. App. A, p. 22a, n. 54). Perhaps, but by what standard are we to determine whether *this* degree of processing at *this* port is "substantial enough to exempt [*these*] * * * goods from the intended reach of [*this*] * * * particular statute?" The court of appeals offered no standard; the Solicitor General seems to suggest that § 21 can be the touchstone. But once it is conceded that movements *by way of* foreign or exempted ports are within the coverage of § 27, it is difficult to see how a geographical limitation, like § 21, exempting such a port can provide a standard for evaluating the impact of manufacturing at that port.

We respectfully submit that the Merchant Marine Act does in fact supply the relevant standard. Section 1, 46 U.S.C. 861, declares the policy of the United States "to do whatever may be necessary to develop and encourage the maintenance" of a citizen-owned merchant marine in the interest of national defense and commerce, and commands that the agencies of government shall, "in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained." On the last occasion on which this Court considered § 27,



it found this declaration of policy an adequate reason to avoid an interpretation which would "in large measure defeat the prohibition of § 27." *Central Vermont Transportation Co.* v. *Durning*, 294 U.S. 33, 39 (1935). It should do no less in this case.[4]

Respectfully submitted,

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[4] Despite the Solicitor General's intimation to the contrary (Opp., p. 3, n. 3), the agency's action herein is plainly final and ripe for review. The court of appeals addressed the merits without even discussing the government's argument with respect to finality. The district found the case ripe for review under *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Pet. App. C, p. 49a. Perhaps inconsistently with its finding of ripeness, the district court intimated doubt respecting finality, *viz.*, whether "the clearance reflects the definitive agency position on the application of the Jones Act." Pet. App. C, p. 50a. Any residual doubt is now resolved: (a) Hess is now moving 100,000 b/d of Alaskan oil on foreign bottoms to the Virgin Islands and thence to the mainland, and no forfeiture actions have been instituted; (b) the government on appeal claimed that its prior letter orders were correct and that it was bound by them. App. Br., pp. 50-51.